

# The Right of States to Repatriate Former Refugees

JAMES C. HATHAWAY\*

## I. INTRODUCTION

Armed conflict often results in the large-scale exodus of refugees into politically and economically fragile neighboring states. The burdens on asylum countries can be extreme, and may only be partly offset by the arrival of international aid and protection resources. Moreover, difficulties inherent in the provision of asylum have been exacerbated in recent years by the increasing disinclination of the wealthier countries that fund the United Nations High Commissioner for Refugees (UNHCR) and most other assistance agencies to meet the real costs of protection. In such circumstances, it is unsurprising that as conflicts wind down, host countries ordinarily seek to bring refugee status to an end, and to commence repatriations to the country of origin.<sup>1</sup>

There are two ways in which states parties to the Refugee Convention may be relieved of their duty of protection in such situations. First, it may be the case that a person who is a refugee—that is, who continues to have a well-founded fear of being persecuted—nonetheless decides to go back to a country in which the transition to peace and security remains incomplete. In so doing, the refugee is simply exercising the right of every person to return to his or her own country.<sup>2</sup> But, as a matter of refugee law, if the voluntary return amounts to re-establishment in the country of origin, refugee status

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\* James E. and Sarah A. Degan Professor of Law and Director, Program in Refugee and Asylum Law, the University of Michigan Law School. I have benefited from comments on a draft of this paper kindly provided by Michael Barutciski and Eric Stein, and in particular from Marjoleine Zieck's incisive remarks at The Ohio State University Moritz College of Law Symposium on Post-Conflict Dispute Resolution and Nation-Building, January 2004.

<sup>1</sup> "While at the outset of a crisis, international solidarity and assistance are forthcoming, this support will usually decline the more protracted a refugee situation becomes. This can lead to 'asylum fatigue', erosion of protection standards and considerable pressure on the refugee population to depart . . ." UNHCR, *Voluntary Repatriation*, U.N. GAOR, ¶ 3, U.N. Doc. EC/GC/02/5 (2002) [hereinafter UNHCR, 2002 Note].

<sup>2</sup> "No one shall be arbitrarily deprived of the right to enter his own country." G.A. Res. 2200A/21, *International Covenant on Civil and Political Rights*, U.N. GAOR, Supp. No. 16, at 52, art. 12(4), U.N. Doc. A/6313 (1996) (entered into force Mar. 23, 1976) [hereinafter *Civil and Political Covenant*]. See also UNHCR, 2002 Note, *supra* note 1, ¶ 11.

comes to an end by operation of Article 1C(4) of the Convention. This rule makes good sense: The refugee's actions signal that an essential requirement of refugee status, the presence of the putative refugee *outside* the territory of his or her own country, will no longer be satisfied.<sup>3</sup>

Importantly, though, the simple fact of return to the home country cannot be relied upon to terminate Convention refugee status.<sup>4</sup> Under Article 1C(4), it is only if and when the refugee is *re-established* in the country of origin that refugee status comes to an end.<sup>5</sup> Refugees who return to a country emerging from conflict are therefore afforded a critical source of protection: Until and unless they establish a durable presence in their home country, they may elect to return to the asylum state and resume the protection to which they are entitled there.<sup>6</sup>

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<sup>3</sup> An individual qualifies as a refugee under international law only if he or she, "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of nationality . . ." Convention Relating to the Status of Refugees, 189 U.N.T.S. 137, art. 1A(2) (entered into force Apr. 22, 1954) [hereinafter Refugee Convention]. But the refugee definition also provides that, "This Convention shall cease to apply to any person . . . [who] has voluntarily re-established himself in the country which he left or outside of which he remained owing to fear of persecution." *Id.* at art. 1C(4).

<sup>4</sup> This legal conclusion might follow if it is accepted that an individual must be subjectively fearful of return in order to qualify for Convention refugee status. *But see* JAMES HATHAWAY, *THE LAW OF REFUGEE STATUS* 66-75 (1991) [hereinafter *REFUGEE STATUS*] (disputing the notion of a subjective fear requirement).

<sup>5</sup> Once re-establishment has occurred, refugee status comes to an end whether or not the former refugee has, in any meaningful sense, "repatriated" to his or her country of origin. That is, there is no requirement at law that the result of the return home be the restoration of a normal relationship between the (former) refugee and the government of the home state. Repatriation, as Barry Stein has rightly insisted, involves more than just return: "In many situations, 'repatriation' is the wrong term, because there has been no restoration of the bond between citizen and fatherland. 'Return' is a better term because it relates to the fact of going home without judging its content." Barry Stein, *Policy Challenges Regarding Repatriation in the 1990s: Is 1992 the Year for Voluntary Repatriation?* 2 (presented at the Conference on Global Refugee Policy: An Agenda for the 1990s, Aspen Institute, Feb. 1992).

<sup>6</sup> In brief, under Article 1C(4) of the Refugee Convention, the voluntariness of the return and subsequent re-establishment are essential elements of this solution, both because they are part of the test for cessation of refugee status under Article 1C(4), and, more fundamentally, because any mandated return may amount to a breach of the host state's duty of *non-refoulement* under Article 33 of the Refugee Convention. *See* Refugee Convention, *supra* note 3. In view of the right of all individuals to return to their country of citizenship, the truly voluntary decision of a refugee to become re-established in his or her state of origin—including to risk his or her life in so doing—does not violate any duty of the state which has granted protection. But, if return is not really based on the

The alternative solution of repatriation is available only consequent to a fundamental change of circumstances in the state of origin. Under Article 1C(5)–(6) of the Refugee Convention, refugee status is lost once the refugee can no longer claim surrogate international protection, “because the circumstances in connection with which he has been recognized as a refugee have ceased to exist . . . .”<sup>7</sup> Because refugee protection is conceived as protection for the duration of risk,<sup>8</sup> states parties need not honor refugee

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refugee’s free consent, including in situations where it has been coerced by threat of sanction or the withdrawal of rights, the duty of *non-refoulement* is infringed. As such, the voluntariness of the decision to return must be considered in assessing the legality of any return in circumstances where refugee status has not come to an end. Importantly, refugee status does not come to an end simply because a refugee chooses, even with complete freedom, to return to his or her country of origin. The second requirement for valid cessation of refugee status is that the refugee be not just physically inside the country of origin, but rather that he or she be *re-established* there. The original draft of this provision, which would have revoked the refugee status of any person who “returns to his country of former nationality,” was rejected by the Ad Hoc Committee on the grounds that it might bar persons who had been forcibly repatriated to their state of origin, as well as those who had chosen to return to their country of origin only temporarily. The substitute language, which sets the cessation threshold at voluntary re-establishment in the country of origin, was thus intended to ensure that only persons who have willingly resettled in their state of origin are subject to cessation of refugee status. See generally REFUGEE STATUS, *supra* note 4, at 197–99.

<sup>7</sup> Refugee Convention, *supra* note 3, at art. 1C(5)–(6).

We should not lose sight of the fact that international law concerns the imposition of obligations on States. It may be in the individual’s best interest actually to remain in the host country and continue his or her life in exile, but is the State obliged to provide refuge if conditions in the country of origin have become safe within a reasonable time period? Clearly, States never agreed to such legal obligations . . . .

Michael Barutciski, *Involuntary Repatriation when Refugee Protection Is No Longer Necessary: Moving Forward after the 48th Session of the Executive Committee*, 10 INT’L J. OF REFUGEE L. 236, 245 (1998).

<sup>8</sup> As recently observed in the House of Lords, “[r]efugee status is a temporary status for as long as the risk of persecution remains.” *R. v. Secretary of State for the Home Department*, ex parte *Yogathas*, 1 A.C. 920, 954 (2003) (Lord Scott). More explicitly, the English Court of Appeal has noted that, “the Convention only requires this country to grant asylum for so long as the person granted asylum remains a refugee. It would be enough to satisfy the Convention if the Secretary of State were to grant refugees temporary leave to remain for so long as their refugee status persisted.” *Saad v. Secretary of State for the Home Department*, [2001] EWCA Civ 2008 (Eng. C.A.). See generally James Hathaway, *The Meaning of Repatriation*, 9 INT. J. OF REFUGEE L. 551 (1997) (also published in *LEGAL AND POLICY ISSUES CONCERNING REFUGEES FROM THE FORMER YUGOSLAVIA* 4–11 (European University Institute ed., 1997)) [hereinafter *Meaning of Repatriation*].

rights once the underlying cause of flight has been extinguished.<sup>9</sup> In such circumstances, the host government is ordinarily entitled to require the former refugee to depart from its territory,<sup>10</sup> and to return to his or her state of origin.<sup>11</sup> Without the protection of refugee law, the individual concerned is

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<sup>9</sup> This is the most clear in the case of (the overwhelming majority of) refugees who hold the citizenship of that country, and who lose their refugee status only if the change of circumstances means that the refugee "can no longer . . . continue to refuse to avail himself of the protection of the country of his nationality . . . ." Refugee Convention, *supra* note 3, at art. 1C(5). In the case of stateless refugees, only the ability to return to the country of former habitual residence is required for cessation to ensue. *Id.* at art. 1C(6). Cessation under Article 1C(1)–(2), while less common, is similarly predicated on the re-establishment of a protective bond between the refugee and his or her country of origin. See REFUGEE STATUS, *supra* note 4, at 191–97.

<sup>10</sup> The situation is somewhat more ambiguous for states parties to the 1969 Organization of African Unity ("OAU") Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 U.N.T.S. 45 (entered into force June 20, 1974) [hereinafter OAU Convention]. While Article 1(4)(e) of that treaty is largely comparable to the right of cessation due to a fundamental change of circumstances found in the Refugee Convention, Article 5(1) of the OAU Convention expressly provides that "[t]he essentially voluntary character of repatriation shall be respected *in all cases and no refugee shall be repatriated against his will.*" *Id.* at art. 5(1) (emphasis added). The African treaty does not make clear how this provision is to be related to the cessation clauses. On the one hand, the reference to the duty to respect the voluntary character of repatriation "in all cases" could be read to limit the right of states to repatriate even a person who is no longer a refugee by virtue of cessation of status. On the other hand, the final clause more clearly stipulates that the requirement of voluntarism may in fact be invoked only by a person who is a "refugee," thereby excluding a *former* refugee whose status has validly ceased. If read to apply only to *present* refugees, then the OAU provision can not only be reconciled to its own cessation clauses, but also be applied in consonance with Article 1C(4) of the Refugee Convention, which does require voluntary re-establishment by a person otherwise entitled to refugee status before the duty to protect him or her comes to an end. Refugee Convention, *supra* note 3, at art. 1C(4).

<sup>11</sup> While the range of issues to be considered in initially assessing the existence of a well-founded fear and at the cessation stages is similar, Article 1C(5)–(6) of the Refugee Convention nonetheless insists upon a higher standard of scrutiny in the context of adjudicating cessation. The Canadian Federal Court has sensibly taken the view that while the criteria for cessation due to changed circumstances are not technically binding at the time of initial status assessment, nonetheless "when a panel is weighing changed country conditions, together with all the evidence in an applicant's case, factors such as durability, effectiveness and substantiality are still relevant. The more durable the changes are demonstrated to be, the heavier they will weigh against granting the applicant's claim." *Penate v. Canada*, [1993] F.C. 79, 95. *Accord Villalta v. Canada*, [1993] F.C. 1025 (holding that the cessation criteria "are a small subset of a larger circle of circumstances in which status will not be found to exist. This small subset is what must be proven by the government if it wishes to take status away from someone but it

in the same position as any other non-citizen; he or she is subject to removal, so long as that can be accomplished without the breach of any relevant norm of international human rights law.<sup>12</sup> Because the repatriation of the former refugee cannot by definition involve a risk of *refoulement*<sup>13</sup> (it having been found that there is no longer an objective risk of being persecuted in the country of origin), repatriation does not require the former refugee's consent.<sup>14</sup>

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does not control the framework of the analysis . . . in determining whether status exists . . . I do not mean to suggest that in assessing the significance of changed country conditions, for the purpose of deciding whether to grant status, the [decisionmaker] should not consider factors such as the significance, the likely effectiveness, and likely durability of the changed conditions. But I do not think the [decisionmaker] needs to apply the *more demanding criteria*, which it is necessary to meet when one is considering removal of status . . . (emphasis added)).

*But see* Minister for Immigration and Multicultural Affairs v. Betkoshabeh (1999), 55 A.L.D. 609 (taking the view that there is no difference between the initial test for determining the existence of a well-founded fear and that for the cessation of refugee status under Article 1C). In my opinion, because cessation involves the withdrawal of an acquired status from a refugee—based upon an already proved or assumed risk of being persecuted—the refugee should be subjected to uprooting and enforced departure only where there is particularly clear evidence that protection is no longer required. *Accord* UNHCR, *Note on the Cessation Clauses*, U.N. GAOR, ¶¶ 8, 9, U.N. Doc. EC/47/SC/CRP.30 (1997) [hereinafter UNHCR, *Cessation Note*].

Given that the application of the cessation clauses would result in the withdrawal of refugee status, the clauses should be interpreted in a restrictive way . . . UNHCR recommends that in deciding whether to invoke the cessation clauses, States should take into account the consequences of cessation of refugee status. Difficulties which may follow from the invocation of the cessation clauses should be considered in both the decision and the timing of cessation. In particular, States should avoid a situation where the former refugee remains in the country of asylum without a definite legal status or with an illegal status. Human rights factors should be taken into account as well as previously acquired rights of refugees, particularly in regard to those who, due to their long stay in the country of asylum, have developed strong family, social and economic links there.

*Id.*

<sup>12</sup> For a discussion on the limitations on lawful repatriation set by international human rights law, see *infra* text accompanying note 117.

<sup>13</sup> “No Contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” Refugee Convention, *supra* note 3, at art. 33(1) (second emphasis added).

<sup>14</sup> Insistence on consent to repatriation could easily grant *former* refugees what amounts to a veto over their return to the home state, based on reasons which may have nothing to do with the criteria for cessation under Article 1C(5)–(6). For example,

Instead of promoting a clear understanding of the rules governing the solutions of voluntary re-establishment and of repatriation consequent to a fundamental change of circumstances, UNHCR routinely speaks instead of the solution of "voluntary repatriation." The agency's Executive Committee, for example, has "not[ed] that [while] voluntary repatriation, local integration and resettlement are the traditional durable solutions for refugees, . . . voluntary repatriation is *the preferred solution*, when feasible."<sup>15</sup> This trio of solutions—which includes no reference to the solutions of voluntary re-establishment, or of repatriation as such—is repeated like a mantra in all agency standard-setting.<sup>16</sup>

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spokespersons for Chakma refugees from Bangladesh articulated a 13-point charter of demands before they would agree to go back to Chittagong (in Bangladesh). While many of the demands related to cessation criteria, others—including compensation for the refugees, and the eviction of Muslim settlers from traditional tribal lands—did not. THE TIMES OF INDIA, Jan. 17, 1994, *cited in* B.S. CHIMNI, IACL NATIONAL REPORT FOR INDIA 12 (1994). Moreover, even in the context of decisions regarding the UNHCR mandate itself, it has been noted that, "the means do not yet exist to enable the wishes and choices of the refugees themselves to play a decisive part in determining their own future." United Nations Research Institute for Social Development (UNRISD), *Refugees Returning Home: Report of the Symposium for the Horn of Africa on the Social and Economic Aspects of Mass Voluntary Return Movements of Refugees*, Addis Ababa, Sept. 15-17, 14 (1993). Accord UNHCR, *Guidelines on International Protection* No. 3: *Cessation of Refugee Status under Articles 1(C)(5) and (6) of the 1951 Convention relating to the Status of Refugees*, U.N. GAOR, 58th Sess., ¶ 7, U.N. Doc. HCR/GIP/03/03 (2003) [hereinafter UNHCR, *Ceased Circumstances Guidelines*] ("Cessation under Article 1C(5) and 1C(6) does not require the consent of or a voluntary act by the refugee. Cessation of refugee status terminates rights that accompany that status.").

<sup>15</sup> UNHCR, Executive Committee Conclusion No. 89, *Conclusion on International Protection*, U.N. GAOR, 55th Sess., at Preamble (2000) (emphasis added). All Executive Committee Conclusions are available at the UNHCR Executive Committee's website, <http://www.unhcr.ch/cgi-bin/texis/vtx/excom>.

<sup>16</sup> See, e.g., UNHCR, Executive Committee Conclusion No. 18, *Voluntary Repatriation*, U.N. GAOR, 35th Sess. (1980); UNHCR, Executive Committee Conclusion No. 41, *General Conclusion on International Protection*, U.N. GAOR, 41st Sess. (1986); UNHCR, Executive Committee Conclusion No. 46, *General Conclusion on International Protection*, U.N. GAOR, 42d Sess. (1987); UNHCR, Executive Committee Conclusion No. 55, *General Conclusion on International Protection*, U.N. GAOR, 44th Sess. (1989); UNHCR, Executive Committee Conclusion No. 62, *Note on International Protection*, U.N. GAOR, 45th Sess. (1990); UNHCR, Executive Committee Conclusion No. 68, *General Conclusion on International Protection*, U.N. GAOR, 47th Sess. (1992); UNHCR, Executive Committee Conclusion No. 74, *General Conclusion on International Protection*, U.N. GAOR, 49th Sess. (1994); UNHCR, Executive Committee Conclusion No. 79, *General Conclusion on International Protection*, U.N. GAOR, 51st Sess. (1996);

Despite the frequency with which it is championed, “voluntary repatriation” is in fact a concept derived from the text of the UNHCR Statute,<sup>17</sup> not from the Refugee Convention which binds states. It arguably makes sense to limit the agency’s mandate to repatriations which are voluntary<sup>18</sup>; given the inability to distinguish dependably between refugees and others in the context of the complex emergency situations UNHCR routinely confronts, any other position might well compromise the credibility of an international organization expressly tasked to promote protection.<sup>19</sup>

But, as useful as “voluntary repatriation” is as a construct for the regulation of UNHCR agency activity, the notion of voluntary repatriation is

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UNHCR, Executive Committee Conclusion No. 81, *General Conclusion on International Protection*, U.N. GAOR, 52d Sess. (1997); UNHCR, Executive Committee Conclusion No. 85, *Conclusion on International Protection*, U.N. GAOR, 53d Sess. (1998); UNHCR, Executive Committee Conclusion No. 87, *General Conclusion on International Protection*, U.N. GAOR, 54th Sess. (1999); UNHCR, Executive Committee Conclusion No. 89, *supra* note 15; UNHCR, Executive Committee Conclusion No. 101, U.N. GAOR, 59th Sess. (2004).

<sup>17</sup> “The High Commissioner shall provide for the protection of refugees falling under the competence of his Office by . . . [a]ssisting governmental and private efforts to promote voluntary repatriation . . .” G.A. Res. 428(V), *Statute of the Office of the United Nations High Commissioner for Refugees*, U.N. GAOR, Supp. No. 20, at 46, art. 8(c), U.N. Doc. A/1775 (1950) [hereinafter UNHCR, *Statute*].

<sup>18</sup> *Id.* Beyond its statutory authority, UNHCR may engage in other repatriation activities only with the authorization of the General Assembly of the United Nations. *Id.* at art. 9. The Executive Committee of UNHCR has recently gone beyond this constraint in a modest way, calling upon the agency to “tak[e] clear public positions on the acceptability of return of persons found not to be in need of international protection.” UNHCR, Executive Committee Conclusion No. 96, *Conclusion on the Return of Persons Found Not to Be in Need of International Protection*, U.N. GAOR, 58th Sess., at j(ii) (2003). The reference to persons not in need of international protection refers, however, only to persons not initially entitled to recognition of Convention refugee status. *See, e.g.,* UNHCR, *Handbook: Voluntary Repatriation: International Protection*, U.N. GAOR, 51st Sess. (1996) [hereinafter UNHCR, *Voluntary Repatriation Handbook*].

<sup>19</sup> *See* UNHCR, *Voluntary Repatriation Handbook*, *supra* note 18, at 5–8. While this is undoubtedly a very cautious reading of its authority, UNHCR’s disinclination to become involved in mandated repatriation may well be critical to its ability to secure and maintain the trust of refugees, and more generally to avoid any possible conflict of interest with its overarching responsibility to champion the protection of refugees. Article 8(c) of its statute clearly does not prohibit participation by UNHCR in the mandated repatriation of persons who are no longer refugees, since these persons presumptively cease to be persons under the competence of UNHCR. UNHCR, *Statute*, *supra* note 17, at art. 6. But, the agency is not expressly authorized to lend its assistance to mandated repatriation efforts absent authorization from the General Assembly under Article 9. *Id.* at art. 9.

not, in and of itself, legally relevant to the treaty-based duty of protection which binds governments. While the voluntariness of the repatriation may well be sufficient to ensure that the state has not breached the duty of *non-refoulement* under Article 33,<sup>20</sup> cessation of refugee status occurs only when there is either voluntary re-establishment (not just return), or when repatriation (whether voluntary or not) has taken place after a fundamental change of circumstances has been shown to exist in the country of origin.

Indeed, the uneasy relationship between "voluntary repatriation" and the real solutions open to states parties has recently been tacitly acknowledged by UNHCR:

While the 1951 Convention . . . and its 1967 Protocol do not deal with voluntary repatriation, the cessation clauses of the Convention have *some relevance* to voluntary repatriation, *albeit indirectly*. Article 1(C)(4) of the 1951 Convention stipulates that refugee status ceases if refugees voluntarily re-establish themselves in the country of origin. Furthermore, successful completion of voluntary repatriation programmes *often indicates* that circumstances which caused flight no longer exist. This *is relevant* for the purposes of declaring general cessation, as foreseen in Article 1(C)(5). Voluntary repatriation is therefore a process which, *ultimately*, leads to cessation of refugee status, be it on an individual basis or on a more general level.<sup>21</sup>

Putting to one side the mistaken view that cessation under the Convention may simply be declared for all members of a given refugee population,<sup>22</sup> this analysis makes clear that, while voluntary repatriation has relevance to the question of cessation of status, it is in no sense a substitute for satisfaction of the true legal requirements set by the Convention.

In practice, however, the near-complete silence of UNHCR on the

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<sup>20</sup> Refugee Convention, *supra* note 3, at art. 33(1).

<sup>21</sup> UNHCR, 2002 Note, *supra* note 1, ¶ 8 (emphasis added).

<sup>22</sup> Article 1C(5)–(6) is framed in explicitly individualized terms. It refers, for example, to the circumstances in connection with which "he" has been recognized, and to the implausibility of the refugee continuing "to refuse to avail himself" of the state of origin's protection." Refugee Convention, *supra* note 3, at art. 1C(5)–(6). More generally, failure to take account of individuated risks, which may continue despite a generalized absence of risk, could breach Article 33's duty of *non-refoulement*, which is also framed in individuated terms, *i.e.*, "where his life or freedom would be threatened." Refugee Convention, *supra* note 3, at art. 33(1). While states may begin from a general presumption of absence of risk based on general, group-defined assessments, they must therefore provide a full and fair opportunity for individual refugees to contest such presumptions on the basis of the facts of their own particular circumstances.



normative framework for anything other than “voluntary repatriation” has proved to be the source of tremendous conceptual incoherence in the refugee regime. Simply put, repatriation as a solution is simply never discussed by UNHCR; it always refers to its agency-based standard, “voluntary repatriation.” Indeed, the legality of mandated repatriation is barely acknowledged. Ironically, even as the agency has elaborated the requirements for cessation of refugee status due to a fundamental change of circumstances, it has not gone on to make the obvious linkage between satisfaction of the test for cessation of status under Article 1C(5)–(6) and the right of states parties to require repatriation of former refugees to their country of origin,<sup>23</sup> much less has UNHCR engaged in the critical complementary analysis of the legal constraints which define the conditions under which lawful, mandated repatriation may take place.

In the result, states seeking to exercise their right to require former refugees to repatriate are left in a conceptual void. While the Convention clearly contemplates a right to bring refugee status to an end, with or without the assent of the persons concerned, that solution is not recognized as such by the agency appointed to oversee implementation of the Convention,<sup>24</sup> and all relevant standards consistently speak not to repatriation justified by a fundamental change of circumstances, but only to “voluntary repatriation.” How exactly are states to proceed?

The purpose of this article is squarely to confront this dilemma. For the reasons set out above, states have the right to enforce the repatriation of former refugees once a fundamental change of circumstances is in place. That process need not be voluntary.<sup>25</sup> Indeed, as Barutciski has rightly

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<sup>23</sup> UNHCR indirectly recognizes the legality of mandated repatriation by observing that valid cessation of refugee status under Article 1C(5)–(6) involves “loss of refugee status and the rights that accompany that status, and it may contemplate the return of persons to their countries of origin.” UNHCR, *Ceased Circumstances Guidelines*, *supra* note 14, ¶ 25.

<sup>24</sup> “The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees . . . in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.” Refugee Convention, *supra* note 3, at art. 35(1).

<sup>25</sup> *Accord* Barutciski, *supra* note 7, at 249.

[T]he concept of voluntary repatriation is incoherent if taken as a legally binding standard. Its value appears in terms of recommending that a State take into account the individual’s desire to return home. Although this is undoubtedly a reasonable recommendation, it cannot be a coherent legally binding standard according to international principles of refugee protection.

*Id.*

observed, "The promotion of involuntary repatriation if and when refugee protection ceases to be necessary is a pragmatic approach that represents an acceptable compromise between legitimate State concerns and the protection needs of refugees."<sup>26</sup> If states are to be persuaded not to pander to the often powerful political, economic, and social imperatives bluntly to force refugees to leave their territory—a particularly acute risk when large groups arrive during times of armed conflict—then more than ritualistic invocation of the duty of non-refoulement is called for. There must instead be real clarity about the legal standard which governs mandated repatriation.

It may be that UNHCR's decision to speak only about "voluntary repatriation" is based on a well-meaning hope that its silence on mandated repatriation will induce states to avoid that solution. But the analysis below suggests that the failure to elaborate the circumstances under which refugees may be required to go home has had the opposite consequence, including the forcible return of persons who remain entitled to refugee status. Of perhaps greatest concern, recent moves to require states to take their cue from UNHCR on the timing of repatriation and even on the propriety of cessation of refugee status are likely simply to add to the conceptual confusion which already exists.

## II. THE REQUIREMENTS FOR CESSATION OF REFUGEE STATUS

The critical groundwork upon which to build a legal framework for mandated repatriation is in place. As framed by UNHCR, there are three requirements for deeming Convention refugee status to have ceased by reason of a change of circumstances.<sup>27</sup> The first requirement is that the change in the country of origin be genuinely *fundamental*.<sup>28</sup> Second, it must be *enduring*.<sup>29</sup> Third, it must result not just in the eradication of a well-founded fear of being persecuted, but also in the *restoration of protection*.<sup>30</sup> Taken together, these tests give substance to the UNHCR Executive Committee's view that the cessation of refugee status is warranted only

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<sup>26</sup> *Id.* at 254.

<sup>27</sup> UNHCR, *Ceased Circumstances Guidelines*, *supra* note 14, ¶¶ 10–16. This language is an overall improvement on the test which I proposed—namely, that the change be "of substantial political significance[,] . . . truly effective[,] . . . [and] shown to be durable." REFUGEE STATUS, *supra* note 4, at 200–02. In particular, the insistence on a restoration of protection gives clearer guidance on the meaning of effectiveness.

<sup>28</sup> UNHCR, *Ceased Circumstances Guidelines*, *supra* note 14, ¶¶ 10–12.

<sup>29</sup> *Id.* ¶¶ 12–14.

<sup>30</sup> *Id.* ¶¶ 15–16.

“where a change of circumstances in a country is of such a profound and enduring nature that refugees from that country no longer require international protection and can no longer continue to refuse to avail themselves on the protection of their country . . . .”<sup>31</sup>

This cautious approach to cessation is very much in line with the intentions of the drafters of the Refugee Convention, who showed no inclination to authorize the withdrawal of refugee status on the basis of changes that are insufficiently fundamental to justify the conclusion that “the circumstances in connection with which [a refugee] has been recognized . . . *have ceased to exist* . . . .”<sup>32</sup> Indeed, the type of circumstance which they had in mind in proposing Article 1C(5)–(6) was the reversion of a totalitarian state to democratic governance:

To take the case of the aged belonging to the hard core of refugees, it could hardly be agreed that the government of a country which had returned to democratic ways should fail to take over the burden of that category of refugees . . . . [France] was quite prepared to continue to assist such refugees so long as such assistance was necessary. But if their country reverted to a democratic regime, the obligation to assist them should not fall perforce upon the French Government . . . . France merely said that she did not wish to be under an obligation to continue to provide assistance to refugees who could seek the protection of their country of origin.<sup>33</sup>

To meet the first requirement of “fundamental change,” UNHCR has opined that:

A complete political change remains the most typical situation in which this cessation clause has been applied. Depending on the grounds for flight, significant reforms altering the basic legal or social structure of the State may also amount to fundamental change, as may democratic elections, declarations of amnesties, repeal of oppressive laws[,] and dismantling of former security services.<sup>34</sup>

Caution of this kind is appropriate in order to ensure that a refugee’s life not

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<sup>31</sup> UNHCR, Executive Committee Conclusion No. 65, *General Conclusion on International Protection*, U.N. GAOR, 46th Sess., at (q) (1991), *aff’d*, UNHCR, Executive Committee Conclusion No. 69, *Cessation of Status*, U.N. GAOR, 47th Sess. (1992).

<sup>32</sup> Refugee Convention, *supra* note 3 (emphasis added).

<sup>33</sup> Statement of Mr. Rochefort of France, U.N. Doc. A/CONF.2/SR.28, at 12–14 (July 19, 1951).

<sup>34</sup> UNHCR, *Cessation Note*, *supra* note 11, ¶ 20.

be disturbed simply because there is evidence of movement in a peaceful or rights-regarding direction; the basic reforms must rather be in place before cessation is contemplated. Thus, for example, the German Administrative Court in 1992 refused to recognize a fundamental change of circumstances in Romania—where the Communist era secret police had been re-established—in contrast to the more radical structural reforms undertaken in Poland, Czechoslovakia, and Hungary, which were appropriately considered of sufficient magnitude to justify a cessation inquiry.<sup>35</sup>

The fundamental nature of a reform is moreover not a function simply of its social and political significance. Rather, it must also be determined that whatever changes have occurred genuinely “address the causes of displacement which led to the recognition of refugee status.”<sup>36</sup> Even major political reforms do not warrant cessation unless they are causally connected to the risk upon which refugee status was recognized, or could presently be justified. Clearly, whatever general view may be taken of the significance of a change of circumstances must be tested by reference to the particularized circumstances of the applicant:

[W]hen one says that “change” in circumstances is an important consideration, one is not speaking of any change. The [decisionmaker] must not be content in simply noting that changes have taken place, but must assess the impact of those changes on the person of the applicant.<sup>37</sup>

The importance of contemplating cessation only when there is evidence of fundamental change—in the sense that it is both truly significant and substantively relevant—is closely connected to the second requirement: The reform must be shown to be enduring. In the case of an Indian Sikh at risk under the regime of Indira Gandhi, for example, a reviewing court was satisfied that a relevant change of circumstances had occurred because “six years had passed since the assassination of Indira Gandhi and the incidents of

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<sup>35</sup> Federal Republic of Germany Administrative Court, Ansbach, Dec. No. AN17K91.42844 (1992), reported as Abstract No. IJRL/0193 in 6 INT’L J. OF REFUGEE L. 282 (1994); see also *Nkosi v. Canada*, [1993] F.C. 629 (declining to refuse refugee status on the basis of a “hesitant and equivocal finding that certain limited changes in circumstances in Zaire had occurred . . .”).

<sup>36</sup> UNHCR, *Ceased Circumstances Guidelines*, *supra* note 14, ¶ 10. “Fundamental changes are considered as effective only if they remove the basis of the fear of persecution; therefore, such changes must be assessed in light of the particular cause of fear, so as to ensure that the situation which warranted the grant of refugee status has ceased to exist.” UNHCR, *Cessation Note*, *supra* note 11, ¶ 19.

<sup>37</sup> *Arggello-Garcia v. Canada*, [1993] F.C. 635.

alleged persecution, and . . . a new government was in place in India.”<sup>38</sup> While 12 to 18 months since a fundamental reform is argued by UNHCR to be the minimum time which should elapse before cessation is contemplated,<sup>39</sup> the more basic rule is “that all developments which would appear to evidence significant and profound changes be given time to consolidate before any decision on cessation is made.”<sup>40</sup> Because the progress of consolidation is context-specific, the time required to establish the durability of change will inevitably be longer where the reform was the result of conflict,<sup>41</sup> and hence less likely to be quickly and whole-heartedly embraced by all:

Occasionally, an evaluation as to whether fundamental changes have taken place on a durable basis can be made after a relatively short time has elapsed. This is so in situations where, for example, the changes are peaceful and take place under a constitutional process, where there are free and fair elections with a real change of government committed to respecting fundamental human rights, and where there is relative political and economic stability in the country.

A longer period of time will need to have elapsed before the durability of change can be tested where the changes have taken place violently, for instance, through the overthrow of a regime. Under the latter circumstances, the human rights situation needs to be especially carefully assessed. The process of national reconstruction must be given sufficient time to take hold and any peace arrangements with opposing militant groups must be

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<sup>38</sup> *Virk v. Canada*, [1992] F.C. 119.

<sup>39</sup> As noted by UNHCR,

In the *Discussion Note on the Application of the ‘Ceased Circumstances’ Cessation Clause in the 1951 Convention* (EC/SCP/1992/CRP.1), it was advocated that a period of twelve to eighteen months elapse after the occurrence of profound changes before such a decision is made. It is UNHCR’s recommendation that this period be regarded as a minimum for assessment purposes. Recent applications of the cessation clause by UNHCR show that the average period is around four to five years from the time fundamental changes commenced.

UNHCR, *Cessation Note*, *supra* note 11, ¶ 21.

<sup>40</sup> *Id.*

<sup>41</sup> As such, cessation should clearly not be contemplated simply because there is presently peace in an area previously prone to conflict. This point was neatly made by the Federal Court of Canada. “The very article in *The Economist* cited by the [decisionmaker] states merely, ‘for now there is peace . . .’ leaving it an open question to the reader how long this status quo will last. Given this result, we do not find it necessary to consider the other matters raised . . .” *Abarajithan v. Canada*, [1992] F.C. 54.

carefully monitored.<sup>42</sup>

Third and most important, the fundamental and durable reform must be shown to have dependable, practical protection consequences. In many cases, courts have shown an unhealthy willingness to defer to formal evidence of fundamental change without carefully assessing the resultant ground reality.<sup>43</sup> For example, the fall of the Mengistu regime in Ethiopia,<sup>44</sup> the existence of a formal cease-fire in Somalia,<sup>45</sup> as well as the signing of peace

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<sup>42</sup> UNHCR, *Ceased Circumstances Guidelines*, *supra* note 14, ¶¶ 13–14. In contrast, for example, refugees from the Democratic Republic of Congo were told to prepare for return only two months after the signing of a peace accord. *DRC Refugees Reluctant to Go Home*, THE DAILY NEWS (Zimb.), Oct. 1, 2002, available at <http://www.queensu.ca/samp/migrationnews/2002/oct.htm> (last visited Aug. 11, 2004). The result of a premature termination of refugee status may simply be that refugees end up coming back to the former host state, as was the case for many Burundians removed from Tanzania who were forced once more to flee fighting between the government and rebel forces. *Hundreds More Flee Burundi as Conflict Escalates*, IRIN, Oct. 2, 2002, available at <http://irinnews.org/print.asp?ReportID=30203> (last visited Aug. 11, 2004). Alternatively, they may feel compelled to seek protection in another state party, as was the case for Rwandans deported from Tanzania, many of whom then sought asylum in Zimbabwe. *Zimbabwe Hit by Influx of Refugees*, THE DAILY NEWS (Zimb.), Feb. 15, 2003, available at <http://www.queensu.ca/samp/migrationnews/2003/feb.htm> (last visited Aug. 11, 2004).

<sup>43</sup> Governments may also focus unduly on the formalities of change. Australian immigration minister Philip Ruddock was quoted in April 2003 as having said that “Australia has no obligation to take into account the safety of [Iraq] when it comes to returning the refugees,” despite the fact that the military victory was not yet consolidated, and the political transition barely commenced. Greg Barns, *Sheik’s Advice for Howard and Bush*, CANBERRA TIMES, Apr. 25, 2003, at A-15, available at LEXIS, News Library, Allnws File.

<sup>44</sup> “The Mengistu regime has fallen. The successor government stated that its aim was a ‘broad-based transitional government, representative of Ethiopia’s various tribes and factions, as a prelude to fair elections and multi-party democracy.’” Canadian Immigration and Refugee Board, Dec. No. U91-05190 (Feb. 21, 1992), at 113–14.

<sup>45</sup> Despite its recognition of the need to avoid the premature determination of durability of change, the Full Federal Court of Australia nonetheless deferred to a determination by the tribunal that a Somali claim could be dismissed on the grounds that a cease-fire in the civil war in that country had been announced by warlords eleven days prior to the hearing. *Ahmed v. Minister for Immigration and Multicultural Affairs*, (1999), 55 A.L.J. 618. Justice Branson, however, took serious issue with this approach:

First, the cease-fire upon which the Tribunal placed reliance was of recent origin . . . . A conclusion by a decision-maker as to the likely effectiveness of the cease-fire, having regard to the preceding seven years of civil war in Somalia, called for some caution. Secondly, the material before the Tribunal upon which it based its

accords in El Salvador<sup>46</sup> and Guatemala<sup>47</sup> have all been treated as a sufficient basis to find the need for refugee status to have dissipated. Other courts, however, have properly insisted on the need for patience before finding a fundamental reform to be relevant to the cessation of refugee status.<sup>48</sup> The Federal Court of Canada thus reversed a decision to deny refugee status to an Iranian applicant on the basis of political reforms in that country, it having been determined that the reforms had not, in fact, put an end to the practice of politically inspired arrests and executions.<sup>49</sup>

This qualitative dimension of effective reform has recently been helpfully described by UNHCR as linked to the core concern of the refugee definition itself—namely whether it can truly be said that the refugee can presently “avail himself of the protection” of his or her home state:

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conclusion that peace had existed in Somalia since January 31, 1998 was, at best, tentative in character.

*Id.*

<sup>46</sup> As one court said,

The documentary evidence describes the peace accord and provides details with respect to its implementation and progress. It is a fact that some documentary evidence also shows that the changes in El Salvador are conservative in nature and that human rights abuses continue. However, it is apparent to me that the Board concluded that as a result of the changed circumstances the Applicant as a union member no longer had cause for a well-founded fear of persecution, and I believe it was open to the Board on the evidence before it to conclude as it did.

*Caballos v. Canada*, [1993] F.C. 623.

<sup>47</sup> See, e.g., *Gomez Garcia v. INS*, 187 F.3d 641 (8th Cir. 1999); *Anibal Mazariegos v. INS*, 241 F.3d 1320 (11th Cir. 2001).

<sup>48</sup> In response to the claim of a Ugandan Arab, the Canadian Immigration and Refugee Board had determined that the Ugandan government “intended to restore democracy, the rule of law[,] and respect for human rights.” *Ahmed v. Canada*, [1993] F.C. 1035. In response, the Federal Court noted succinctly that, “These may well have been Museveni’s intentions, but these intentions have not materialized.” *Id.* Similarly, in rejecting the sufficiency of the fall of the Siad Barré regime in Somalia as a basis for finding there to have been a fundamental and durable change of circumstances, the same court observed that, “That finding . . . must be linked with their further finding that the country continues to be divided along tribal lines and to be torn by civil war.” *Abdulle v. Canada*, [1992] F.C. 67. In a particularly succinct rebuke of the official propensity to seek premature revocation of status, the Federal Court of Canada observed that, “If the political climate in a country changes to the extent that it adversely affects the status of a refugee, the Minister may make an application to . . . determine whether the person has ceased to be a Convention refugee. Presumably, the Minister would only seek such a determination after monitoring the effects of any political change in the subject country.” *Salinas v. Canada*, [1992] F.C. 231.

<sup>49</sup> *Oskoy v. Canada*, [1993] F.C. 644.

In determining whether circumstances have changed so as to justify cessation under Article 1C(5) or (6), another crucial question is whether the refugee can effectively re-avail him- or herself of the protection of his or her own country. Such protection must therefore be effective and available. It requires more than mere physical security or safety. It needs to include the existence of a functioning government and basic administrative structures, as evidenced for instance through a functioning system of law and justice, as well as the existence of adequate infrastructure to enable residents to exercise their rights, including their right to a basic livelihood. An important indicator in this respect is the general human rights situation in the country . . . .<sup>50</sup>

As such, it is not sufficient to find simply that the fundamental and durable reform has eliminated the particular well-founded fear of the refugee. Cessation is warranted only if and when an affirmative situation has been established, namely the "restoration of protection"<sup>51</sup> to the refugee. In line with this approach, the U.N. Committee on the Elimination of Racial Discrimination adopted the view that "refugees . . . have, after their return to their homes of origin, the right to participate fully and equally in public affairs at all levels and to have equal access to public services and to receive rehabilitation assistance."<sup>52</sup> Equally important, the principle that protection must actually be "available" ensures that refugee status cannot be withdrawn in circumstances where the country of origin refuses to readmit the individual concerned.<sup>53</sup> For example, Bhutan has questioned the citizenship of many

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<sup>50</sup> UNHCR, *Ceased Circumstances Guidelines*, *supra* note 14, ¶¶ 15–16.

<sup>51</sup> *Id.*

<sup>52</sup> *Report of the Committee on the Elimination of Racial Discrimination*, U.N. General Recommendation XXII, 51st Sess., Supp. No. 18, at para. 2(d), U.N. Doc. A/51/18 (1996). Thus, for example, it is doubtful that protection was re-established while reliance continued to be placed on Bosnian war-time property legislation, which effectively precluded the return by refugees to their pre-1992 homes. *Two Years After Dayton: A View from Bosnia's Ombudsperson*, 22 FORCED MIGRATION MONITOR 1 (Mar. 1998) available at <http://www.soros.org/fmp2/html/mar98.htm> (last visited Aug. 11, 2004).

<sup>53</sup> According to the Executive Committee,

In some cases, persons who are not in need of international protection can, nonetheless, not be returned to their country. Return may be impossible even for those who did not leave for refugee-related reasons. Countries of origin may refuse to readmit nationals who do not volunteer to return, or who do not apply for travel documents; in some cases, the authorities may deny that the individual is their national, a dispute which may be difficult to resolve.

UNHCR, *Return of Persons Not in Need of International Protection: Report of the Executive Committee of the High Commissioner's Programme*, at para. 7, U.N. Doc.



Bhutanese refugees awaiting repatriation from Nepal, in consequence of which they have been unable to return for more than a decade.<sup>54</sup> There clearly has been no restoration of protection in such circumstances, and hence refugee status should not be deemed to have come to an end.

### III. THE FAILURE TO LINK CESSATION TO THE RIGHT OF MANDATED REPATRIATION

The right of states parties to undertake mandated repatriation follows quite directly from satisfaction of the criteria just described. In short, any person who previously benefited from Convention refugee status, but whose status has ceased in accordance with Article 1C(5)–(6), may lawfully be required to depart that state's territory. The only qualification on this right is the duty of the state to meet other requirements of international human rights law, including during the process of effecting removal. In particular, account must be taken of the former refugee's rights to security of person; to be free from cruel, inhuman, or degrading treatment; and not to be subjected to arbitrary or unlawful interference with his or her family life. The nature of these requirements is described below.<sup>55</sup>

In practice, however, a Convention-based understanding of repatriation has yet to emerge. At one level, this is simply a reflection of practical reality that UNHCR, rather than states, has managed the overwhelming majority of repatriations of former refugees to date. Because most repatriations involve returns from one less developed country to another, poorer host states lacking the resources to effectuate repatriation on their own have generally turned to UNHCR to underwrite and/or conduct the repatriation effort.<sup>56</sup> When it

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EC/46/SC/CRP.36 (1996). In the context of Bosnia, the High Representative reported that the rate of refugee return was dramatically slowed by both legal and bureaucratic impediments. "Closing loopholes in property legislation and firing foot-dragging officials (I removed 22 in one day alone) boosted the rate of minority returns . . ." Wolfgang Petritsch, *In Bosnia, An 'Entry Strategy'*, WASH. POST, July 2, 2002, at A-15.

<sup>54</sup> After many rounds of talks, only about 2.5% of the population seeking repatriation has been recognized by Bhutan as having its citizenship, and hence entitled to return. *Nepal: Bhutanese Refugees Rendered Stateless, Leading Global NGOs Criticize Screening Process*, HUMAN RIGHTS WATCH, June 18, 2003. As Jesuit Refugee Service explained, "More than 70% [of the refugees] were classed as Category 2 or voluntary migrants, who would have to re-apply for citizenship if they wished to return; and this would involve a two-year probation period, following which their chances of being accepted as Bhutanese citizens are unclear." 135 JRS DISPATCHES, July 1, 2003.

<sup>55</sup> See *infra* text accompanying note 116 for an elaboration of the implications of these duties.

<sup>56</sup> In 2002, for example, the governments of Burundi and Tanzania announced that

chooses to participate, UNHCR understandably takes the view that it must operate in line with what it reads as its statutory mandate to effect only *voluntary* repatriation.<sup>57</sup> The fiscal reality in much of the less developed world has thus meant that the dominant standard for repatriation is not truly Convention-based at all, but is rather structured to meet the requirements of UNHCR's institutional mandate to undertake only repatriation that is "voluntary,"<sup>58</sup> and which can be accomplished "in safety and with dignity."<sup>59</sup>

Yet when states do become directly involved in repatriations, the overwhelming dominance of the UNHCR's agency-based approach means that they do so without any clear guidance on the scope of their authority. There is no clear, internationally endorsed framework which distinguishes between the right of states to undertake repatriation under the terms of the Convention (which is constrained principally by considerations of risk and the availability of protection, but not of voluntariness) and the institutional

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they would "send a delegation to UNHCR headquarters in Geneva to petition for allowing repatriation to all areas in Burundi . . . [A UNHCR spokesperson] said that at a recent tripartite meeting, a request had been made to the U.N. for funding to allow both governments to conduct the repatriations themselves." *Dwindling Numbers of Refugees Opting for Repatriation*, IRIN, July 8, 2002.

<sup>57</sup> As Zieck has observed, "In comparison to the time when 'voluntary repatriation' functioned predominantly in the form of the possibility to refuse repatriation, as an eligibility criterion in order to protect those who were considered to have valid reasons against returning, 'voluntary repatriation' now functions as a mode of cessation of refugee status." MARJOLEINE ZIECK, *UNHCR AND VOLUNTARY REPATRIATION OF REFUGEES: A LEGAL ANALYSIS* 430 (1997). The historical reasons for undue attention being paid to UNHCR's approach to repatriation, in contrast to the development of an authentic understanding of repatriation based upon the terms of the Refugee Convention itself, are set out in *Meaning of Repatriation*, *supra* note 8.

<sup>58</sup> See, e.g., Lawyers Committee for Human Rights, *General Principles Relating to the Promotion of Refugee Repatriation* (1992), at princ. 3 (insisting erroneously that, "Refugee repatriations must be voluntary"). Rather than insisting on voluntariness as a legal requirement, the more defensible position is to refer to its logic as a barometer of protection. Amnesty International, for example, has sensibly suggested that a focus on voluntariness

helps ensure that refugees' rights and dignity are respected. It increases the likelihood that the returning population will be able to successfully reintegrate and rebuild. Voluntariness also recognizes that it is refugees themselves who are generally the best judges of whether conditions have become sufficiently safe in the country of origin. In that respect it plays an important protection role.

Amnesty International, *Great Lakes Region: Still in Need of Protection: Repatriation, Refoulement and the Safety of Refugees and the Internally Displaced*, at 4, A.I. Doc. No. AFR/02/07/97 (1997) [hereinafter *Amnesty Great Lakes Report*].

<sup>59</sup> UNHCR, *Voluntary Repatriation Handbook*, *supra* note 18.

mandate of the UNHCR. In such circumstances, protection risks can arise.

In particular, the pattern of state practice in much of the less developed world is for governments to take UNHCR involvement in the repatriation of a given refugee population as a sufficient imprimatur for the termination of their own duty to protect the refugees in question, with no real attention being paid to the criteria for cessation of status that actually bind them. UNHCR's institutional decision to commence "voluntary repatriation" is treated in practice as supplanting the state's duty to apply the relatively demanding cessation criteria of the Convention. This confusion of state duties with UNHCR's agency-based approach would be of little moment if states engaged only in truly voluntary repatriation efforts. But there are, in fact, too many instances where governments simplistically treat UNHCR's commencement of voluntary repatriation activities as a signal to undertake their own, frequently less than truly voluntary, repatriation programs. And regrettably, UNHCR may become implicated in such efforts.

In an extreme case, the Tanzanian government announced in early December 1996 that, "all Rwandese refugees in Tanzania are expected to return home by 31 December 1996."<sup>60</sup> This announcement, "endorsed and co-signed by the UNHCR,"<sup>61</sup> resulted in the return of more than 500,000 refugees within the month.<sup>62</sup> The criteria for cessation under Article 1C(5)–(6) could not possibly have been met in the circumstances—fair trials were only beginning in Rwanda, disappearances and deliberate killings were continuing there, and there was no reason to believe that the country could meet the basic needs of the returning refugees.<sup>63</sup> Again, in 2002, UNHCR announced that it had received "assurances [from] the Tanzanian and Rwandan governments that security in Rwanda *had improved*,"<sup>64</sup> and

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<sup>60</sup> Amnesty Great Lakes Report, *supra* note 58, at 2.

<sup>61</sup> UNHCR pronounced itself satisfied that the returns were in fact voluntary despite solid evidence to the contrary. *See id.*

<sup>62</sup> "Initially tens of thousands of refugees fled the [Tanzanian'] camps and attempted to move further into Tanzania, in the hope of reaching neighboring countries. The Tanzanian security forces intercepted the fleeing refugees and 'redirected' them towards the Rwandese border . . . . Reports now indicate that some refugees who refuse to go back are being arrested and held in a detention camp . . . . Other refugees who wished to remain were undoubtedly forced back in the rush." *Id.* at 2. Importantly, it was only after the returns occurred that UNHCR "expressed hope that Tanzania [would] institute a screening procedure to evaluate the claims of individuals too fearful to return." *Id.*

<sup>63</sup> *Id.* at 5–6.

<sup>64</sup> *Focus on Rwanda Refugees in Tanzania*, IRIN, May 9, 2002 (emphasis added). It is noteworthy that at this time the training of judges who would preside over the trial of persons accused of all but the highest category of genocide crimes had only been

sanctioned the voluntary repatriation of the remaining 20,000 Rwandan refugees living in Tanzania.<sup>65</sup> Yet, even the spokesperson for a partner agency participating in the ensuing "voluntary" repatriation conceded that the repatriation actually conducted by Tanzania relied upon an "impetus" in the form of "verbal pressure"<sup>66</sup>—in particular, a firm, year-end deadline for the refugees' departure.<sup>67</sup> In at least some instances, officials implementing the program used brute force to compel even long-term Rwandan residents to leave the country.<sup>68</sup>

As the Tanzanian example makes clear, the risks of state reliance on UNHCR involvement as a signal to commence their own repatriation efforts are exacerbated by the fairly routine involvement of the agency in promoting repatriation before the requirements of the Convention's change of

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commenced. It was therefore not surprising that Rwandan refugees continued to express grave reservations about the practical efficacy of commitments to protect them from retaliation. *Id.*

<sup>65</sup> *Rwandan Refugees to be Out by December 31*, THE EAST AFRICAN, Oct. 14, 2002.

<sup>66</sup> *Thousands More Refugees Seek Repatriation*, IRIN, Jan. 9, 2002 (quoting Mark Wigley, deputy director of Norwegian People's Aid). In the context of a subsequent effort by Tanzania to repatriate refugees to Burundi, a consortium of U.S.-based non-governmental organizations (NGOs) called upon the Tanzanian government to "cease placing political and psychological pressure" on the refugees to return. *NGOs Concerned Over Voluntary Repatriation of Refugees*, IRIN, May 15, 2002.

<sup>67</sup> Indeed,

[n]ewspapers in Eastern Africa have reported that Tanzania will forcibly send 2,000 Rwandan refugees living in the camps in western Tanzania back to Rwanda. The 2,000 are those who refused to return home during the recent voluntary repatriation, citing insecurity in their home country as the reason for remaining . . . . The feeling in the Tanzanian government is that there is no need for the refugees to remain because the security situation in Rwanda is now stable. Earlier this month, Tanzania's Home Affairs Minister, Mr. Omar Ramadhan Mapuri[,] warned that Tanzania might be forced to repatriate all the refugees living in the country if the international community does not intervene in the serious food crisis facing the refugees.

<sup>127</sup> JRS DISPATCHES, Feb. 28, 2003.

<sup>68</sup> According to one news report,

The President of the National Repatriation Commission . . . [said] that the move by the Tanzanian government had caught more than the evictees by surprise. 'We had not anticipated this. We asked them to stop the process for some time so that we can talk with them and work out the modalities of how it should be done' . . . . [Tanzanian ambassador to Rwanda] Mwakalindile admits that the forced repatriation may not have been handled appropriately.

*Forced to Go Home: Rwandan Immigrants in Tanzania*, INTERNEWS, Apr. 15, 2003.

circumstances cessation clause are met.<sup>69</sup> Indeed, UNHCR's Executive Committee has instructed the agency that:

From the outset of a refugee situation, the High Commissioner should at all times keep the possibility of voluntary repatriation for all or part of a group under active review and the High Commissioner, whenever he deems that the prevailing circumstances are appropriate, should actively pursue the promotion of this solution.<sup>70</sup>

In reliance on this instruction, UNHCR has adopted a spectrum of institutional positions on repatriation, which explicitly includes the facilitation of return "even where UNHCR does not consider that, objectively, it is safe for most refugees to return"<sup>71</sup>:

While the condition of fundamental change of circumstances in the country of origin will usually not be met in such situations, UNHCR may consider facilitating return in order to have a positive impact on the safety of refugees/returnees as well as to render assistance which the refugees may require in order to return. Such assistance may have to be given in the absence of formal guarantees or assurances by the country of origin for the safety of repatriating refugees, and without any agreement or understanding having been concluded as to the basic terms and conditions of return.<sup>72</sup>

Indeed, UNHCR as an agency will, on occasion, be under pressure to proceed quickly to repatriate refugees,<sup>73</sup> particularly where there is a perceived need to be supportive of more broadly based political and social transitions. For example, Mafwe refugees from Namibia anxious for their

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<sup>69</sup> For example, UNHCR justified its facilitation of repatriation to northern Burundi in 2002 on the grounds that the region (though not the country as a whole) was "deemed relatively secure." *Dwindling Numbers of Refugees Opting for Repatriation*, *supra* note 56. The agency launched a repatriation exercise for refugees in Zambia "because the peace process[es] in war-torn neighbouring countries are progressing well." *UNHCR to Begin Repatriation of Refugees in Zambia*, ZAMBEZI TIMES, Sept. 17, 2002 (quoting UNHCR Country Representative, Ahmed Gubartala).

<sup>70</sup> UNHCR, Executive Committee Conclusion No. 40, *Voluntary Repatriation*, U.N. GAOR, 40th Sess., at (e) (1985).

<sup>71</sup> UNHCR, *Voluntary Repatriation Handbook*, *supra* note 18, at 15.

<sup>72</sup> *Id.*

<sup>73</sup> UNHCR has recently acknowledged that, at times, it promotes voluntary repatriation "when the life or physical integrity of refugees in the country of asylum is threatened to the point that return is the safer option." UNHCR, *2002 Note*, *supra* note 1, at para. 29(iv).

security by reason of their pro-secessionist activities were assured by UNHCR that they should accept repatriation because the situation in Namibia was “calm,” and the Namibian government deserved “a pat on the back.”<sup>74</sup> Similarly, UNHCR launched a regional initiative in 2003 to promote the voluntary repatriation of some 500,000 Angolan refugees from Zambia, Namibia, and Democratic Republic of Congo. The exercise—styled as “organized voluntary repatriation”<sup>75</sup>—was predicated on the existence of “current peace”<sup>76</sup> in a country just emerging from more than a quarter-century of civil war, and UNHCR’s view that “acceptable conditions”<sup>77</sup> prevailed there. While promoted as integral to the success of a national reconstruction program for Angola,<sup>78</sup> some refugees were deeply opposed to the initiative, particularly in view of the disastrous attempt to promote their repatriation based upon another cease-fire in 1994.<sup>79</sup> Clearly, no sound case

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<sup>74</sup> *Scared Refugees Reluctant to Return Home*, AFRICAN CHURCH INFORMATION SERVICE, Mar. 24, 2003 (quoting Cosmos Chanda, UNHCR representative to Botswana).

<sup>75</sup> *Authorities Sign Repatriation Accords with Zambia and Namibia*, ANGOLA PRESS AGENCY, Nov. 28, 2002.

<sup>76</sup> *Angolan Refugees Leave for Home in May*, TIMES OF ZAMBIA, Mar. 5–13, 2003 (quoting Zambian Home Affairs Permanent Secretary, Peter Mumba). Not even UNHCR appears to have believed that a definitive peace had been established when the promotion of repatriation was agreed to. UNHCR spokesperson Lucia Teoli observed that, “Previous attempts to bring people back home failed because of the ongoing war, but since the cease-fire in April, most people and leaders believe that peace is irreversible in the country. *The UNHCR is optimistic about this attempt.*” *First Wave of Angolan Refugees to Go Home Next Year*, IRIN, Nov. 28, 2002 (emphasis added).

<sup>77</sup> *UNHCR Prepares to Start Repatriating Angolans*, THE NAMIBIAN, Apr. 23, 2003 (quoting an interview with UNHCR Senior Protection Officer, Magda Medina, and Public Information Officer, David Nthengwe).

<sup>78</sup> *Angola-Zambia: UNHCR Addresses Returnee Concerns of Landmines and Hunger*, IRIN, Mar. 14, 2003 (quoting UNHCR regional spokesperson, Fidelis Swai).

<sup>79</sup> *Angolan Refugees Reluctant to Return Home*, TIMES OF ZAMBIA, Mar. 18–26, 2003.

Most refugees from the former Portuguese colony are reluctant to go back to the land of their forefathers unless they are assured of a durable cease-fire between Unita and the MPLA government. Even the news that former Unita leader Jonas Savimbi is dead and buried, and [that] the country is on a reconstruction course, is not good enough to convince them. But you would not blame them entirely for dragging their feet over their return to their homeland. Their fears may be well-founded . . . [Some] are jittery [because] someone told them in 1994, shortly after the Lusaka Peace Protocol was signed between Unita and the MPLA government, that there was peace in Angola and they, therefore, could return to their country. They are fearful because most of those, if not all, who returned received a rude shock when they were greeted with barrels of guns.

could be made that conditions in either Namibia or Angola had yet reached the point that states parties could validly deem their refugee status to have come to an end.

Even less happily, UNHCR's determination to end its mandate in relation to particular refugee groups, and to promote their repatriation, may at times reflect no more than the need to reduce long-term care expenditures in an era of shrinking budgets, financial insecurity, and increased political pressure from states.<sup>80</sup> Indeed, the Angolan repatriation was reported to have been driven in part by concerns "to ease logistical pressure on both the [host] government[s] and UNHCR, which have had to look after a rapidly expanding refugee population in a time of dwindling resources."<sup>81</sup> More clearly still, UNHCR's decision to end assistance to, and step-up the voluntary repatriation of, Muslim Rohingya refugees to Burma—despite the continued reality of grave and systematic discrimination, including the denial to them of citizenship—really cannot be explained on protection grounds.<sup>82</sup>

There is, of course, no valid legal justification for state invocation of UNHCR's authorization of *voluntary* repatriation to effect what amounts in practice to *involuntary* repatriation. But it remains that the ability of states to avoid the more exacting requirements for cessation of status, which in fact bind them, has been facilitated by UNHCR's failure to articulate the differences between its institutional role in repatriation and the distinct requirements for mandated return consequent to valid cessation of status.<sup>83</sup>

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*Id.*

<sup>80</sup> As Amnesty International noted in a stinging critique of UNHCR's decision to assist Tanzania's December 1996 enforced repatriation of Rwandans, "That [protection] oversights were possible, were legitimized by UNHCR, and were so readily accepted by the international community speaks volumes. Does the world remain committed to protecting refugees, or do we now emphasize return, for political and financial reasons, over safety?" Amnesty Great Lakes Report, *supra* note 58, at 3.

<sup>81</sup> *40,000 Refugees Return Home from Zambia*, ZAMBEZI TIMES, Apr. 16, 2004.

<sup>82</sup> *Lack of Protection Plagues Burma's Rohingya Refugees in Bangladesh*, REFUGEES INTERNATIONAL, May 30, 2003.

While conditions for Rohingya inside Burma have hardly changed in the last decade, what appears to have changed is UNHCR's policy towards Rohingya concerning rights to UNHCR protection and support. By stepping up repatriation efforts and reducing assistance to refugees[,] . . . UNHCR has created an environment in which protection for the Rohingya is virtually untenable.

*Id.*

<sup>83</sup> Even as UNHCR has acknowledged the difference between its institutional standards for voluntary repatriation and the right of states to invoke the cessation clauses, its own language contributes to confusion on this point. See, e.g., UNHCR, *Ceased Circumstances Guidelines*, *supra* note 14, ¶ 29.

and rigorously to supervise the application of those standards.<sup>84</sup> The question then arises: Why would UNHCR not speak directly to the issue of mandated repatriation, and insist upon respect for Convention obligations?

#### IV. THE RISKS OF INSTITUTIONAL OVERREACHING

The marginal influence of Convention-based standards is not simply the result of the *de facto* dominance of UNHCR in repatriation practice, nor even of states seeking to avoid their legal obligations by (the often disingenuous) assertion of compliance with the agency's "voluntary repatriation" standard as an alternative to satisfaction of the Convention's cessation criteria. More fundamentally, these risks have been substantially increased by UNHCR actions, which actively promote deference to the UNHCR repatriation practices shown above, and therefore give rise to the risk of premature mandated repatriation. In addition, UNHCR has more recently sought to persuade governments to take their cue on the application of the test for cessation of refugee status from the agency itself, thereby compounding the risk that states will simply defer to UNHCR practice rather than conscientiously applying the legal standards that in fact bind them.

In practice, it is not surprising that the existence of a large-scale, UNHCR-authorized repatriation is commonly understood to suggest the

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[V]oluntary repatriation can take place at a lower threshold of change in the country of origin, occurring as it does at the express wish of the refugee, who may also have personal reasons for repatriating, regardless of the situation prevailing in the country of origin. Therefore, the facilitation or promotion of voluntary repatriation by UNHCR does not necessarily mean that the cessation clause should be applied. However, where large-scale voluntary repatriation is organized against a backdrop of fundamental changes and providing that such fundamental changes stabilize and can eventually be considered as durable, the cessation clause may be invoked at an appropriate later time.

*Id.*

<sup>84</sup> For example, in its discussion of repatriation consequent to the application of Article 1C(5)–(6), UNHCR notes that the "Convention does not address the question of *voluntary* repatriation of refugees directly." UNHCR, *Voluntary Repatriation Handbook*, *supra* note 18, at 8–10 (emphasis added). Not only is there no explicit recognition of the right of states to enforce mandated repatriation when the criteria of Article 1C(5)–(6) are met, but the Handbook obfuscates the question by making the (technically accurate) general assertion that, "The principle of voluntariness is the cornerstone of international protection with respect to the return of refugees," without simultaneously acknowledging its non-applicability to persons who have ceased to be refugees. *Id.* at 10. Despite a recent and more candid approach to the issue of cessation itself, no comparable frankness on the consequential right of mandated repatriation has been forthcoming. See UNHCR, *Ceased Circumstances Guidelines*, *supra* note 14, ¶ 7.



propriety of repatriation as a general policy, equally open to states parties.<sup>85</sup> But there is evidence that UNHCR may do little to challenge that perception, and may at times even rely upon it.<sup>86</sup> Particularly when the language of enthusiasm for return is embraced by UNHCR—for example, its decision in early 2003 to “change its policy from merely facilitating to actively promoting repatriation to Rwanda . . . [under a plan] *harmonised* [sic] and *implemented across Africa*”<sup>87</sup>—a signal is sent to governments that repatriation is really the appropriate course of action for states themselves to pursue.

At times, UNHCR has moved beyond failure to challenge prevailing assumptions about the salience of its repatriation role, and has instead actively advanced positions which suggest that national practice on repatriation *should be guided* by relevant UNHCR institutional decisions—even though, as described above, the UNHCR decision to promote repatriation is often made at a time when cessation due to a fundamental change of circumstances would be premature.<sup>88</sup> Indeed, deference to UNHCR positions on when to pursue repatriation is said by the agency to be part of the “responsibilities of the host country.”<sup>89</sup> Against the backdrop of such pronouncements, the risk of premature repatriation without due regard to the Convention’s cessation criteria is intensified. For example, Zambia raised concerns about the risks of landmines for Angolan refugees slated for

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<sup>85</sup> The point is not that UNHCR intends to provide comfort to states anxious to avoid the strictures of Article 1C(5)–(6); to the contrary, as discussed below, its formal positions adumbrate strict requirements for cessation. But, because these requirements are not linked to the right of states to effect mandated repatriation, the opportunity for confusion and obfuscation arises.

<sup>86</sup> For example, the Zambian Home Affairs Permanent Secretary was quoted as having said that his country was “not in a hurry to repatriate the more than 5,000 Rwandan refugees currently in the country until the United Nations signs a cessation clause to strip them of their status . . . . He said the repatriation procedures and endorsement were done by the international community and the host nation only gave a helping hand to the UNHCR.” *Repatriation of Rwandan Refugees Voluntary*, TIMES OF ZAMBIA, Mar. 3, 2003.

<sup>87</sup> *5,000 Refugees to be Repatriated from Zambia*, IRIN, Jan. 20, 2003 (quoting UNHCR’s Regional Coordinator for the Great Lakes Region, Wairimu Karago) (emphasis added). This policy shift was apparently justified on the basis of a belief that the Rwandan justice system was positioned to deal with genocide allegations more quickly and fairly. *Id.*

<sup>88</sup> See *supra* text accompanying note 69.

<sup>89</sup> UNHCR, *Voluntary Repatriation Handbook*, *supra* note 18. Specifically, UNHCR asserts that “The country of asylum should respect the leading role of UNHCR in promoting, facilitating[,] and coordinating voluntary repatriation.” *Id.* at 12, sec. 2.5.

repatriation by UNHCR, but was reportedly lobbied by UNHCR to acquiesce in the return. The agency sought to reassure Zambia that even though many areas were "heavily mined . . . '[w]ith the funding UNHCR has received, we will be expanding our presence in those areas of resettlement to ensure that people are *reminded of the threat* of landmines. So the problem is *being addressed*.'"<sup>90</sup>

The blurring of the line between the circumstances under which UNHCR may legitimately promote the genuinely voluntary return of refugees and the conditions which justify the withdrawal of protection by a state party is most acute when UNHCR opts not simply to encourage the repatriation of a refugee population, but instead issues what it refers to as a "formal declaration of general cessation."<sup>91</sup> The legal relevance of such declarations is understandably ambiguous to states and others. Subject to the views of the Economic and Social Council, UNHCR may elect to apply a somewhat different version of the changed circumstances cessation clause<sup>92</sup> to refugees in receipt of its institutional protection or assistance. On the other hand, states—and only states—are entrusted with the responsibility to apply conscientiously the Convention's cessation clause to refugees in receipt of their protection.<sup>93</sup>

Despite this clear delineation of responsibilities, the agency has recently

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<sup>90</sup> *Angola-Zambia: UNHCR Addresses Returnee Concerns of Landmines and Hunger*, *supra* note 78 (emphasis added).

<sup>91</sup> UNHCR, *Ceased Circumstances Guidelines*, *supra* note 14, at n.3. Historical examples include: Applicability of the Cessation Clauses to Refugees from Poland, Czechoslovakia and Hungary, Nov. 15, 1991; Applicability of Cessation Clauses to Refugees from Chile, Mar. 18, 1994; Applicability of the Cessation Clauses to Refugees from the Republics of Malawi and Mozambique, Dec. 31, 1996; Applicability of the Cessation Clauses to Refugees from Bulgaria and Romania, Oct. 1, 1997; Applicability of the Ceased Circumstances, Cessation Clauses to pre-1991 refugees from Ethiopia, Sept. 23, 1999; and Declaration of Cessation Timor Leste, Dec. 20, 2002. *Id.*

<sup>92</sup> The change of circumstances cessation clause which governs the work of UNHCR does not simply limit cessation to persons in fact able to avail themselves of the protection of their country of origin, but instead directs attention to whether persons have no more than grounds "of personal convenience," including "[r]easons of a purely economic character," for refusing to avail themselves of the home country's protection. UNHCR, *Statute*, *supra* note 17, at art. 6(A)(ii)(e).

<sup>93</sup> In the same year in which they debated the issue of legal standards for repatriation, the states that make up UNHCR's Executive Committee affirmed that, "refugee protection is primarily the responsibility of States, and . . . UNHCR's mandated role in this regard cannot substitute for effective action, political will, and full cooperation on the part of States . . ." UNHCR, Executive Committee Conclusion No. 81, *supra* note 16, at (d).4

taken the view that its own institutional positions on competence are to be treated by states as directly relevant to cessation under the Convention:

The Executive Committee Conclusion 69 affirms that any declarations by UNHCR that its competence ceases to apply in relation to certain refugees may be useful to States in connection with the application of the cessation clauses. Where UNHCR has made a declaration of cessation of its competence in relation to any specified group of refugees, States may resort to the cessation clauses for a similar group of refugees if they deem it appropriate and useful for resolving the situation of these refugees in their territory.<sup>94</sup>

This ambition to determine effectively the issue of cessation for states parties is most clearly seen in the way in which UNHCR speaks about changes to the application of its institutional mandate. For example, the High Commissioner for Refugees is reported to have stated during a visit to Africa that "Rwanda is safe for refugees in Tanzania and Uganda . . . . 'In Tanzania, we informed the refugees that they could return to Rwanda. Some have returned but many remain,' he said . . . . Such people, he said, *were 'not refugees anymore.'*"<sup>95</sup> A similar elision of institutional and Convention-based determinations can be seen even in UNHCR's more formal statements. For example, a press release of May 8, 2002, entitled, "UNHCR Declares Cessation of Refugee Status for Eritreans," stated:

UNHCR announced . . . that it is ending refugee status for all Eritreans who fled their country as a result of the war of independence or the recent border conflict between Ethiopia and Eritrea. The world-wide cessation will take effect on December 31 and will affect hundreds of thousands of Eritreans in neighbouring countries.<sup>96</sup>

Only near the end of the statement is the true scope of the declaration made clear, though still in language which suggests the logic of its more general applicability, and followed immediately by a reference to the process of

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<sup>94</sup> UNHCR, *Cessation Note*, *supra* note 11, ¶ 33. The same document candidly recognized, however, that "[t]he decision to apply the 'ceased circumstances' cessation clause lies with the State of asylum concerned." *Id.* ¶ 36. Its most recent statements on the issue, however, fails even to note that cessation decisions are, in fact, the duty of states parties to adjudicate. UNHCR, *Ceased Circumstances Guidelines*, *supra* note 14.

<sup>95</sup> *Rwanda-Tanzania-Uganda: Rwanda is Safe for Returning Refugees*, Says UNHCR Head, IRIN, Apr. 16, 2003 (emphasis added).

<sup>96</sup> Press Release, United Nations High Commissioner for Refugees, UNHCR Declares Cessation of Refugee Status for Eritreans (May 8, 2002).

cessation under the Refugee Convention:

"I believe that these two groups of refugees from Eritrea should no longer have a fear of persecution or other reasons to continue to be regarded as refugees," said Ruud Lubbers, U.N. High Commissioner for Refugees. "They will, therefore, cease to be regarded as refugees by my Office with effect from the end of this year."<sup>97</sup>

As these positions make clear, whatever risk of confusion regarding standards for repatriation exists by virtue of UNHCR's *de facto* dominance of repatriation efforts in the less developed world and the manipulation of those standards by some poorly intentioned host states is intensified when the agency seeks to issue signals on the appropriate timing of repatriation, and especially when it seeks to equate its institutional positions on cessation of refugee status with the determinations that are in fact to be made by states parties.<sup>98</sup> It is bad enough that UNHCR has not made it clear when, and under what circumstances, mandated repatriation of former refugees is lawful under the Convention. But, it becomes increasingly difficult to criticize states for premature repatriation efforts when they are instructed to rely on agency determinations (intended to lead to the promotion by UNHCR of "voluntary repatriation") as the foundation for their own decisions regarding when to terminate status and commence what may lawfully be—and often are in fact—involuntary repatriations. The elision of standards and mandates has

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<sup>97</sup> *Id.* The immediate next paragraph reads,

Both the 1951 Refugee Convention and the 1969 OAU Convention, which is applied in Africa, stipulate that the conventions shall cease to apply to any refugee . . . "if he can no longer, because of the circumstances in connection with which he was recognized as a refugee have ceased to exist, continue to avail himself of the protection of the country of his nationality."

*Id.*

<sup>98</sup> There is no legal basis for states parties simply to defer to UNHCR's institutional views on who remains entitled to refugee protection as an alternative to domestic adjudication of the issue. UNHCR decisions to delete particular groups from its institutional competence are not strictly grounded in application of the criteria in Article 1C(5)–(6) of the Convention, and may be compelled by the same political, economic and other concerns which often lead the agency to promote repatriation before safety is fully established. In any event, cessation under the terms of the Refugee Convention cannot lawfully occur on the basis of the sort of blanket pronouncements that UNHCR makes regarding the scope of its mandate—it must rather take account of particularized risk, and individuated circumstances. It is states parties which are held to account under the Refugee Convention, and their accountability is strictly a function of compliance with their formal treaty obligations.

simply created a conceptual morass.

While the conceptual confusion can clearly lead to unwarranted denials of protection, the effort to equate UNHCR views regarding cessation of refugee status with the standards applicable to states may also result in continued protection for persons no longer entitled to refugee status under the Convention. One of the ways in which the cessation criteria that govern the work of UNHCR as an agency differs from that which applies to the actions of states parties to the Refugee Convention is that UNHCR enjoys a broader authority to retain under its competence persons who no longer face the risk of being persecuted, so long as their reasons for refusing to accept the renewed protection of their own country are not simply rooted in economic or other considerations of personal convenience.<sup>99</sup>

Under the Refugee Convention, in contrast, cessation of status is to follow once the changed circumstances test is met.<sup>100</sup> By virtue of an explicit compromise between the majority of drafters, who favored a purely objective test of risk for refugee status, and the minority, who wished to allow refugees to retain their status based upon purely emotional or psychological reasons,<sup>101</sup> pre-1951 refugees were granted the right to invoke a proviso regarding “compelling reasons arising out of previous persecution” to retain their refugee status even after a relevant change of circumstances.<sup>102</sup> But for the future, refugee status was reserved for those able to show a continuing objective risk of being persecuted. Because refugee status requires the ability

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<sup>99</sup> UNHCR, *Statute*, *supra* note 17, at art. 6(e).

The competence of the High Commissioner shall cease to apply to any person . . . if . . . [h]e can no longer, because of the circumstances in connection with which he has been recognized as a refugee have ceased to exist[,] . . . *claim grounds other than personal convenience* for continuing to refuse to avail himself of the protection of the country of nationality. *Reasons of a purely economic nature may not be invoked.*

*Id.* (emphasis added).

<sup>100</sup> Refugee Convention, *supra* note 3, at art. 1(C)(5).

This Convention shall cease to apply to any person . . . if . . . [h]e can no longer, because of the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality . . . .”

*Id.*

<sup>101</sup> See REFUGEE STATUS, *supra* note 4, at 66–69.

<sup>102</sup> “Provided that this paragraph shall not apply to a refugee *falling under Section A(1)* of this Article and who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality.” Refugee Convention, *supra* note 3, at art. 1(C)(5) (emphasis added).

to show "a present fear of persecution,"<sup>103</sup> refugees must be able to show that they "are or may in the future be deprived of the protection of their country of origin."<sup>104</sup>

Despite the clarity of the text of the Refugee Convention on this point, UNHCR has regrettably invoked an unwieldy claim of customary international law to assert not only the duty of states to apply the "compelling reasons" proviso to modern refugees,<sup>105</sup> but also to suggest a responsibility (in principle, if not in law) to read the Convention as the effective equivalent of its own statute.<sup>106</sup> While all states have the sovereign authority to allow any person they wish to remain on their territory and while it will often be humane and right to extend such generosity,<sup>107</sup> this is not a matter fairly

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<sup>103</sup> Statement of Sir Leslie Brass of the United Kingdom, U.N. Doc. E/AC.32/SR.18, at 6 (Feb. 8, 1950).

<sup>104</sup> Statement of Mr. Rochefort of France, U.N. Doc. A/C.3/529, at 4 (Nov. 2, 1949).

<sup>105</sup> "Application of the 'compelling reasons' exception is interpreted to extend beyond the actual words of the provision to apply to Article 1A(2) refugees. This reflects a general humanitarian principle that is now well-grounded in State practice." UNHCR, *Ceased Circumstances Guidelines*, *supra* note 14, ¶ 21. Yet, in the same document, UNHCR concedes that there is, in fact, a paucity of relevant state practice upon which to draw. "Due to the fact that large numbers of refugees voluntarily repatriate without an official declaration that conditions in their countries of origin no longer justify international protection, declarations [of cessation due to changed conditions] are infrequent." *Id.* ¶ 3. It is therefore questionable whether there is truly a sound basis to assert a clear norm of customary international law, which effectively supercedes the text of the Refugee Convention.

<sup>106</sup> *Id.* ¶ 22.

In addition [to exemption based upon the effects of past persecution], the Executive Committee, in Conclusion No. 69, recommends that States consider "appropriate arrangements" for persons "who cannot be expected to leave the country of asylum, due to a long stay in that country resulting in strong family, social and economic links." In such situations, countries of asylum are encouraged to provide, and often do provide, the individuals concerned with an alternative residence status, which retains previously acquired rights, though in some instances with refugee status being withdrawn. Adopting this approach for long-settled refugees is not required by the 1951 Convention per se, but it is consistent with the instrument's broad humanitarian purpose and with respect for previously acquired rights . . . .

*Id.*

<sup>107</sup> The rationale for the extension of the proviso in U.S. law to all refugees has been stated as "an expression of humanitarian considerations that sometimes past persecution is so horrific that the march of time and the ebb and flow of political tides cannot efface the fear in the mind of the persecuted." *Jaswant Lal v. INS*, No. 98-71087, 2001 U.S. App. LEXIS 22693, at \*29-30 (9th Cir. July 3, 2001).

understood to be required by either the text or purposes of refugee law.<sup>108</sup> This point was recently affirmed in a detailed decision of the English Court of Appeal:

Aspirations are to be distinguished from legal obligations. It is significant that a number of the [arguments] relied on by the appellants are expressed in terms of what "could" or "should" be done . . . . This is not the language which one would expect if there was a widespread and general practice establishing a legal obligation . . . .

Where one has clear and express language imposing a restriction upon the scope of a particular provision, as is the case with the proviso to Article 1C(5), it must require very convincing evidence of a widespread and general practice of the international community to establish that that restriction is no longer to be applied as a matter of international law . . . . A number of states do adopt a more generous approach towards Article 1C(5) than is required by the terms of the Convention itself, but they represent . . . a minority of the signatories . . . .

Moreover, it must be seen as significant that the international community did not take the opportunity at the time of the 1967 Protocol to amend the proviso to Article 1C(5) when it was considering the temporal scope of the

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<sup>108</sup> UNHCR has at times recognized as much:

The underlying rationale for the cessation clauses was expressed to the Conference of Plenipotentiaries in the drafting of the 1951 Convention by the first United Nations High Commissioner for Refugees, G. J. van Heuven Goedhart, who stated that refugee status should "not be granted for a day longer than was absolutely necessary, and should come to an end . . . if, in accordance with the terms of the Convention or the Statute, a person had the status of *de facto* citizenship, that is to say, if he really had the rights and obligations of a citizen of a given country." Cessation of refugee status therefore applies when the refugee, having secured or being able to secure national protection, either of the country of origin or of another country, no longer needs international protection.

UNHCR, *Cessation Note*, *supra* note 11, ¶ 4. Indeed, a footnote to the same document recognizes the hortatory nature of the advice to extend the proviso clause beyond its textual ambit.

The proviso expressly covers only those refugees falling under section A(1) of Article 1 of the 1951 Convention, that is, those persons who are considered as refugees under the "Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization." However, the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* suggests that the exception reflects a more general humanitarian principle and could also be applied to refugees other than those in Article 1A(1) of the 1951 Convention (see paragraph 136 of the Handbook).

*Id.* at n.8.

1951 Convention . . . .

One might think it desirable that states should . . . recognise [sic] the humanitarian purpose which would be served by ignoring the restriction on the proviso to Article 1C(5). But that is not enough to establish a legal obligation binding upon all parties to the Convention . . . .<sup>109</sup>

This analysis is clearly compelling as a matter of law. But because UNHCR has been unwilling to distinguish clearly between its own institutional cessation and repatriation authority and that of states parties to the Convention, the authentic scope of the Refugee Convention was unnecessarily and unhelpfully muddled.

## V. CONSTRAINTS ON THE PROCESS OF LAWFUL REPATRIATION

The risks of conflating the principles that govern UNHCR's decisions regarding the termination of protected status and amenability to voluntary repatriation with the cessation requirements of refugee law binding on states, which may lead to mandated repatriation, apply also to the question of limits on the authority of states to require repatriation of persons whose refugee status has ceased. Of relevance not only to governments in the less developed world, but also to industrialized countries increasingly prone to order mandated repatriation, there is real ambiguity in UNHCR's positions regarding the standards which govern the actual process by which lawful repatriation may be effected.

Because this is not a subject expressly addressed by the Convention, the agency has devised a series of policies for the guidance of states. In an early formulation, UNHCR's Executive Committee opined that repatriation must "be carried out under conditions of absolute safety . . . ." <sup>110</sup> The requirement for "absolute" safety has not, however, featured in more recent agency standards, which have instead posited the bifurcated duty to carry out repatriation "in safety, and [with] dignity." <sup>111</sup>

The first part of this notion—safety—is said specifically to require that repatriation be conducted so as to avoid "harassment, arbitrary detention or physical threats during or after return." <sup>112</sup> More recently, UNHCR has noted

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<sup>109</sup> R. (Hoxha) v. Secretary of State for the Home Department, [2002] EWCA Civ 1403 (Eng. C.A.), at paras. 46–48.

<sup>110</sup> UNHCR, Executive Committee Conclusion No. 40, *supra* note 70, at (b).

<sup>111</sup> UNHCR, Executive Committee Conclusion No. 65, *supra* note 31, at (j) (1991). This standard is now embraced by the agency. UNHCR, *Voluntary Repatriation Handbook*, *supra* note 18, at 11.

<sup>112</sup> UNHCR, Executive Committee Conclusion No. 65, *supra* note 110, at (j).



as well that safety requires analysis of “physical security [during the process of return] . . . including protection from armed attacks, and mine-free routes . . . .”<sup>113</sup> The second branch of the UNHCR standard, requiring that return be “with dignity,” is frankly acknowledged by the agency to be “less self-evident than that of safety.”<sup>114</sup> UNHCR defines “return with dignity” to require that “refugees are not manhandled; that they can return unconditionally . . . ; that they are not arbitrarily separated from family members; and that they are treated with respect and full acceptance by their national authorities, including the full restoration of their rights.”<sup>115</sup>

The fungibility of the “in safety and with dignity” standard—particularly the fact that this language is not directly rooted in any clear legal obligations of states—is likely to engender confusion.<sup>116</sup> Because the language stands apart from binding norms of human rights law, the “in safety and with dignity” standard can inadvertently send the signal that UNHCR is merely recommending best practice to governments. To ensure that they are taken seriously, protection concerns would be better served by an explicit linkage to binding legal standards. While these may not encompass every constraint seen as desirable by UNHCR or others, all core concerns are encompassed in a way that clearly commands the respect of governments.

Specifically, the duty to effect repatriation in safety can be said to be a matter of legal obligation, particularly in view of the requirements of Articles 7(1) and 9(1) of the Civil and Political Covenant.<sup>117</sup> These binding standards

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<sup>113</sup> UNHCR, *Voluntary Repatriation Handbook*, *supra* note 18, at 11. The same standard regrettably refers also to considerations actually relevant to the determination of cessation itself, not to the safety of repatriation (“legal safety such as amnesties or public assurances of personal freedom, integrity, non-discrimination and freedom from fear of persecution or punishment upon return . . . [and of] if not mine-free then at least demarcated settlement sites . . . .”). *Id.* It similarly places consideration of material safety (“access to land or means of livelihood”) under the safety rubric, matters which ought instead to be addressed in the context of the requirement of dignified return.

<sup>114</sup> UNHCR, *Voluntary Repatriation Handbook*, *supra* note 18, at 11.

<sup>115</sup> *Id.*

<sup>116</sup> Even those who advocate reference to the “safety” standard impliedly concede its fungibility. *See, e.g.,* GUY GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 276 (2d ed. 1996).

So far as safe return *may* have a role to play in the construction of policy, its minimum conditions include a transparent process based on credible information . . . . These or equivalent means seem likely to ensure that the element of risk is properly appreciated, so reducing the chance of States acting in breach of their protection obligations.

*Id.* (emphasis original).

<sup>117</sup> Human Rights Committee, General Comment 20, U.N. Doc. HRI/GEN/1(1992),

require respectively that states not engage in "torture, or . . . cruel, inhuman[,] or degrading treatment or punishment"<sup>118</sup> and that they affirmatively ensure "security of person."<sup>119</sup> Under the jurisprudence of the Human Rights Committee, a state party is liable for the actions of its agents—logically including those involved in the process of repatriation—even if those actions occur outside the state's own borders.<sup>120</sup> The rights to

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at 29. The European Union has affirmed the centrality of human rights norms to defining the right of repatriation. Its Council Directive on Temporary Protection provides that protection should be ended only when "the situation in the country of origin is such as to permit safe and durable return . . . with due respect for human rights and fundamental freedoms . . ." European Union Council Directive, art. (6)(2), 2001 O.J. 15 (212) (describing minimum standards for giving temporary protection in the event of a mass influx of displaced persons and measures promoting a balance of Efforts between Member States in receiving such persons and bearing the consequences thereof) [hereinafter EU Temporary Protection Directive].

<sup>118</sup> *Civil and Political Covenant*, *supra* note 2, at art. 7.

<sup>119</sup> *Id.* at art. 9(1).

<sup>120</sup> Under Article 2(1) of the Civil and Political Covenant, obligations inhere in "all individuals within [a state's] territory and subject to its jurisdiction . . ." *Civil and Political Covenant*, *supra* note 2. Rather than adopting a literal construction of this standard, the Human Rights Committee has embraced an interpretation which respects the objects and purposes of the Covenant.

Article 2(1) of the Covenant . . . does not imply that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it . . . [I]t would be unconscionable to . . . interpret the responsibility under [A]rticle 2 of the Covenant as to permit a State part to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.

Burgos v. Uruguay, Human Rights Committee, Communication No. R.12/52, U.N. Doc. A/36/40, Supp. No. 40, at 176, para. 12.3 (1981); Casriego v. Uruguay, Human Rights Committee, Communication No. R.13/56, U.N. Doc. A/36/40, Supp. No. 40, at 185, para. 10.3 (1981). In a separate opinion, Committee member Tomuschat offered a helpful explanation of why this result was compelled despite the possibility of a literal construction to the contrary.

To construe the words "within its territory" pursuant to their strict literal meaning as excluding any responsibility for conduct occurring beyond the national boundaries would . . . lead to utterly absurd results. The formula was intended to take care of objective difficulties which might impede the implementation of the Covenant in specific situations. Thus, a State party is normally unable to ensure the effective enjoyment of the rights under the Covenant to its citizens abroad, having at its disposal only the tools of diplomatic protection with their limited potential. Instances of occupation of foreign territory offer another example of situations which the drafters of the Covenant had in mind when they confined the obligations of State parties to their own territory. All of these factual patterns have in common,

be protected from torture and cruel or inhuman treatment, and to benefit from security of person moreover inhere equally in citizens and aliens.<sup>121</sup>

An action may be defined as “cruel or inhuman” if it meets most, but not all, of the criteria for torture. For example, the specific intent requirement may not be met, or the level of pain may not rise to the same level of severity. But actions which are neither cruel nor inhuman are also prohibited if they are “degrading,” meaning that they are intended to humiliate the victim, or show an egregious disregard for his or her humanity. More generally, the duty to ensure “security of person” means that states are required to take measures to protect persons being repatriated by them from foreseeable attacks against their personal integrity, and perhaps also their property. By way of example, the treatment afforded a long-term Rwandan resident of Tanzania by authorities enforcing a bilateral repatriation agreement likely amounted to both degrading treatment, and to a failure to ensure his security of person: “I was grazing livestock; they came and beat me up. In the confusion, I was taken one way and the livestock in another. They took the money I had in my pocket, and told me, ‘Rwandan go home.’”<sup>122</sup>

The “in dignity” prong of the UNHCR repatriation standard is particularly unwieldy. Two of the concerns said to define whether repatriation can be conducted in dignity—the existence of an unconditional right to return and acceptance of the returnee by authorities with restoration of rights—are more appropriately canvassed in the context of the protection prong of the cessation inquiry itself. Nor is there any need to rely on the “in dignity” concept to proscribe the risk of “manhandling,” since such concerns

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however, that they provide plausible grounds for denying the protection of the Covenant. It may be concluded, therefore, that it was the intention of the drafters, whose sovereign decisions cannot be challenged, to restrict the territorial scope of the Covenant in view of such situations where enforcing the Covenant would be likely to encounter exceptional obstacles. Never was it envisaged, however, to grant States parties unfettered discretionary power to carry out wilful and deliberate attacks against the freedom and personal integrity of their citizens living abroad.

Burgos v. Uruguay, *supra*, at App.

<sup>121</sup> “Aliens . . . must not be subjected to torture or to cruel, inhuman or degrading treatment or punishment . . . Aliens have full right to . . . security of person.” Human Rights Committee, General Comment No. 15, *The Position of Aliens Under the Covenant*, at para. 7 (1986).

<sup>122</sup> Mary Kimani, *Forced To Go Home: Rwandan Immigrants in Tanzania*, INTERNEWS, Apr. 15, 2003. The same report noted that, “The President of the National Repatriation Commission, Sheik Abdul Karim Harerimana [said] . . . that the move by the Tanzanian government caught more than the evictees by surprise. ‘We had not anticipated this.’” *Id.*

are encompassed by the duty to ensure a safe return grounded in Articles 7(1) and 9(1) of the Civil and Political Covenant. And while UNHCR is clearly right to argue that repatriation would be undignified if it led to the arbitrary separation of family members, the real constraints on state actions would be made more clear if grounded in specific human rights obligations.<sup>123</sup> The Human Rights Committee has expressly observed that the right to freedom from arbitrary or unlawful interference with family life inheres despite the (former) refugee's status as a non-citizen:

The Covenant [on Civil and Political Rights] does not recognize the right of aliens to enter or reside in the territory of a State party . . . . However, in certain circumstances an alien may enjoy the protection of the Covenant *in relation to entry or residence*, for example, when considerations of non-discrimination, prohibition of inhuman treatment and *respect for family life* arise . . . . [Non-citizens] may not be subjected to arbitrary or unlawful interference with their privacy, *family*, home, or correspondence.<sup>124</sup>

Indeed, there is a firm basis to assert a customary legal duty on states to avoid acts which arbitrarily interfere with family unity, at least where family is defined to include only an opposite-sex spouse and minor, dependant children.

By focusing on the human right to be free from *unlawful* or *arbitrary* interference with family unity, the legally binding nature of state obligations is made more clear. Lawful repatriation consequent to cessation of refugee status is, of course, not sensibly deemed either arbitrary or unlawful *per se*. The relevant question is thus whether the way in which repatriation is

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<sup>123</sup> Reference should be made in particular to Article 17 of the Civil and Political Covenant, *supra* note 2, and to Articles 10(1), 23, and 24 of the International Covenant on Economic, Social and Cultural Rights. *Civil and Political Covenant*, *supra* note 2; G.A. Res. 2200A, *International Covenant on Economic, Social and Cultural Rights*, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter *Economic and Social Covenant*].

<sup>124</sup> Human Rights Committee, General Comment No. 15, *supra* note 121, at paras. 5, 7 (emphasis added). *See also* Human Rights Committee, General Comment No. 17, *On the Rights of the Child (Article 24)*, U.N. GAOR, 44th Sess., Supp. No. 40, Annex VI, at 174, para. 5, U.N. Doc. A/44/40 (1989).

The Covenant requires that children should be protected against discrimination on any grounds . . . . Reports by States parties should indicate how legislation and practice ensure that measures of protection are aimed at removing all discrimination in every field . . . particularly as between children who are nationals and children who are aliens . . . .

*Id.*

effected renders an otherwise permissible act either arbitrary or unlawful. It will ordinarily be possible to respect family unity even while pursuing repatriation, for example by ensuring that the family as a whole is safely returned to the home country. On the other hand, at least where the laws of the host state grant citizenship to all children born on its territory, it may be necessary to delay repatriation of the family unit until any citizen children reach the age of majority, since earlier removal would deny them the right to live in their own country.<sup>125</sup> Indeed, an important decision of the Supreme Court of Canada invoked international law to require that account be taken of the rights of Canadian-born children before ordering the deportation of their non-Canadian mother.<sup>126</sup>

A final concern with the free-standing "in safety, and with dignity" standard is that it likely overstates the real obligations of governments effecting mandated repatriation.<sup>127</sup> As the preceding discussion makes clear,

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<sup>125</sup> Under the United Nations Convention on the Rights of the Child, states "undertake to respect the right of the child to preserve his or her identity, including nationality . . . [and to ensure that no] child is illegally deprived of some or all of the elements of his or her identity." G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, art. 8, U.N.Doc. A/44/49 (1989) (entered into force Sept. 2, 1990). Governments agree to "ensure that a child is not separated from his or her parents against their will, except when . . . such deprivation is necessary for the best interests of the child." *Id.* at art. 9. Moreover, "applications by a child or his or her parents to enter . . . a State Party for the purpose of family reunification shall be dealt with by State Parties in a positive, humane and expeditious manner." *Id.* at art. 10. And under no circumstances may any of the rights guaranteed in the convention be withheld on a discriminatory basis, including on the basis of "the child's or his or her parent's legal or legal guardian's . . . national, ethnic[,] or social origin . . . or other status." *Id.* at art. 2.

<sup>126</sup> *Baker v. Canada*, [1999] S.C.R. 817.

The United Nations Declaration of the Rights of the Child (1959), in its preamble, states that the child "needs special safeguards and care." The principles of the Convention [on the Rights of the Child] and other international instruments place special importance on protections for children and childhood, and on particular consideration of their interests, needs, and rights. They help show the values that are central in determining whether this decision was . . . reasonable.

*Id.*

<sup>127</sup> The difficulty stems in part from the tendency previously discussed to conflate the rules that govern UNHCR's work as an agency with those that circumscribe the repatriation authority of states parties to the Refugee Convention. The elaboration of the meaning of repatriation in safety and with dignity is textually said to define the ways in which UNHCR will conduct its repatriation work. But the language of safety and dignity is included in resolutions of the Executive Committee addressed to the authority of states, and UNHCR follows the recitation of its institutional positions with the assertion that it is part of the "responsibilities of the host country" to "respect the leading role of UNHCR in

international human rights law precludes the right to effect an otherwise lawful repatriation only in circumstances of fairly acute risk.<sup>128</sup> Thus, for example, there is reason to question the legal authority for UNHCR's view that repatriation cannot lawfully be undertaken until the (former) refugee will have access in the destination to material security (access to land or means of livelihood).<sup>129</sup> To the contrary, international human rights law guarantees only a basic right to access the necessities of life,<sup>130</sup> not a full-blown right to have either property<sup>131</sup> or a job. Even the expert charged by the U.N. with

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promoting, facilitating and coordinating voluntary repatriation." UNHCR, *Voluntary Repatriation Handbook*, *supra* note 18, at 8–10.

<sup>128</sup> The most extensive right to non-return apart from the duty which follows from Convention refugee status is that based on application of the European Convention on Human Rights and Fundamental Freedoms. The House of Lords has recently taken the view that, at an extreme level, the risk of infringement of even rights other than Article 3 of the European Convention (the prohibition of torture, inhuman or degrading treatment or punishment) may give rise to a duty of non-return. *R. (on the application of Ullah) v. Special Adjudicator*, [2002] EWCA Civ 1856 (Eng. C.A.), at para. 47; *Do v. Secretary of State for the Home Department*, [2004] UKHL 26. Nonetheless, all of the members of the House of Lords speaking to this issue were clear that, as a general principle, the evidentiary standard for an article other than Article 3 to give rise to a duty of non-return is relatively high. For Lord Bingham, "successful reliance [on articles other than Article 3] demands presentation of a very strong case." (*Special Adjudicator*, [2002] EWCA Civ 1856, at para. 24. Lord Steyn held that, "It will be necessary to establish at least a real risk of a flagrant violation of the very essence of the right before other articles could become engaged." *Id.* at para. 50. Similarly, Lord Carswell insisted on the "flagrancy principle," which he attempted to define:

The concept of a flagrant breach or violation may not always be easy for domestic courts to apply... [T]he right in question would [need to] be completely denied or nullified in the destination country. This would harmonize with the concept of a fundamental breach, with which courts in this jurisdiction are familiar.

*Id.* at para. 69.

In the jurisprudence of the European Court of Human Rights, the only right thus far clearly posited as the basis for an implied right of non-return is Article 8's protection of private life. *See Boultif v. Switzerland*, App. No. 54273/00, 33 Eur. Ct. H.R. at 50, 1179 (2001), approved by *R. (on the application of Razgar) v. Secretary of State for the Home Department*, [2003] EWCA Civ 840 (Eng. C.A.). But the European Court of Human Rights has not suggested that, as a general matter, risk of violation of any right set by the European Convention in the applicant's state of origin is sufficient to give rise to a duty of non-return.

<sup>129</sup> UNHCR, *Voluntary Repatriation Handbook*, *supra* note 18, at 11.

<sup>130</sup> This may be derived from Articles 6, 7, 9, and 10 of the Civil and Political Covenant, as well as from Article 11 of the Economic and Social Covenant. *Civil and Political Covenant*, *supra* note 2; *Economic and Social Covenant*, *supra* note 123.

<sup>131</sup> Perhaps the strongest affirmation of a right to property, and specifically of a right

studying the issue of the property rights of returning refugees has focused his work on housing rights, noting that these rights “are enshrined in international human rights and humanitarian law to a far greater degree and encompass far more under international law, substantively speaking, than . . . property rights more generally.”<sup>132</sup> Second and more critically, the position that repatriation can be ordered only if it results in return to conditions of material security, unhelpfully confuses the standards which should govern the way in which repatriation is conducted with considerations of the qualitative standards that must prevail in the place of destination. The latter questions are part of the cessation inquiry itself, not of the definition of permissible means of repatriation.<sup>133</sup>

By way of helpful contrast, the European Union’s recent Directive on Temporary Protection<sup>134</sup> moves more closely towards the codification of a legally oriented set of constraints on the effectuation of repatriation. The

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of returning refugees to receive restitution for property of which they were deprived, is based on the provisions of the International Covenant on the Elimination of All Forms of Racial Discrimination. G.A. Res. 2106, *International Covenant on the Elimination of All Forms of Racial Discrimination*, U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A/6014 (1966), 660 U.N.T.S. 195 (entered into force Jan. 4, 1969). Under Article 5(d)(v), States parties agree to eliminate racial discrimination (i.e., discrimination based on race, color, national, or ethnic origin) in regard to “[t]he right to own property with others.” *Id.* at art. 5(d)(v). On the basis of this provision, the Committee on the Elimination of Racial Discrimination has “emphasize[d] that . . . refugees . . . have, after their return to their homes of origin, the right to be restored to them property of which they were deprived in the course of the conflict and to be compensated appropriately for any such property that cannot be restored to them. Any commitments or statements relating to such property made under duress are null and void.” *Report of the Committee on the Elimination of Racial Discrimination*, U.N. GAOR, 51st Sess., Supp. No. 18, para. (C)2(c), U.N. Doc. A/51/18 (1996). Article 5 (in contrast to, for example, the Covenant on Civil and Political Rights) does expressly recognize property rights as a form of civil right. But it must be recalled that the purpose of this part of the Convention on the Elimination of Racial Discrimination is clearly to proscribe race-based discrimination. It is legally doubtful that the duty not to discriminate in regard to property rights on grounds of race can be said to give rise to affirmative obligation to recognize property rights in the first place.

<sup>132</sup> *Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons: Preliminary Report of the Special Rapporteur Paulo Sérgio Pinheiro, Submitted in Accordance with Sub-Commission Resolution 2002/7*, U.N. ESCOR, Sub-Commission on the Promotion and Protection of Human Rights, 55th Sess., para. 5, U.N. Doc. E/CN.4/Sub.2/2003/11 (2003).

<sup>133</sup> It is likely that at least some core aspects of material security are relevant to whether or not protection is available in the refugee’s state of origin—the third prong of UNHCR’s recommended approach to assessment of Article 1C(5)–(6).

<sup>134</sup> EU Temporary Protection Directive, *supra* note 117.

Directive acknowledges that the repatriation of those no longer entitled to protection must be conducted with due "respect for human dignity."<sup>135</sup> But it implements that principle by way of two quite specific injunctions.

First, the Directive denies member states the right to expel persons no longer in need of protection if they "cannot, in view of their state of health, reasonably be expected to travel; where for example they would suffer serious negative effects if their treatment was interrupted."<sup>136</sup> A delay in repatriation is also sanctioned (though, regrettably, not required) so as to "allow families whose children are minors and attend school in a Member State . . . to complete the current school period."<sup>137</sup> The specificity of each of these constraints can readily be linked to a duty to conduct repatriation with due regard for human rights obligations—in the one case, the right to basic health care,<sup>138</sup> and in the other, the right of children to access primary education.<sup>139</sup> These constraints moreover do not confuse the question of whether repatriation is warranted at all with the distinct set of issues regarding whether repatriation may be lawfully carried out at a particular moment, and if so, what precautions are required given the circumstances of the individual concerned.<sup>140</sup> They are instead appropriately directed simply to averting the adverse effects of repatriation on the human rights (to access basic health care, and to benefit from primary education) of those to be repatriated by setting relevant constraints on the timing or means by which otherwise lawful repatriation may be effected.

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<sup>135</sup> *Id.* at art. 22(1).

<sup>136</sup> *Id.* at art. 23(1).

<sup>137</sup> *Id.* at art. 23(2).

<sup>138</sup> This right is guaranteed by Article 12 of the Economic and Social Covenant, *supra* note 123.

<sup>139</sup> *Id.* at art. 13(2)(a).

<sup>140</sup> While not required by law, it is both more practical and respectful of refugee autonomy to encourage *former* refugees to return home of their own initiative wherever possible. To this end, the extension to them of a generous deadline for departure, together with a readjustment allowance for voluntary compliance, may be of value. See Manuel Angel Castillo & James C. Hathaway, *Temporary Protection*, in RECONCEIVING INTERNATIONAL REFUGEE LAW 21 (James C. Hathaway ed., 1997). It is unlikely, however, that such a program will be successful when refugees are not convinced of the safety of return. For example, a British initiative for failed asylum seekers from Afghanistan in early 2003—under which individuals were offered £600 and families £2,500 to go back to a "safe area" inside Afghanistan—is reported to have attracted only 39 applicants, far short of the target of 1,000. Nigel Martin, *Protests at First Enforced Return of Afghans Since War*, THE INDEPENDENT, Apr. 29, 2003, at 6.



## VI. CONCLUSIONS

In view of the duty of states simply to protect refugees for the duration of the risk of being persecuted in their home state, it is both explicable and lawful that host governments will seek to bring refugee status to an end when the conflict or other cause of flight abates. As a matter of principle, this possibility should be embraced as an opportunity both to renew asylum capacity and to restore former refugees to their communities of origin. The challenge for those of us committed to refugee protection is not to oppose such returns, but rather clearly to define the criteria for the lawful termination of refugee status, for the commencement of repatriation, and for the conduct of the repatriation exercise itself.

To date, clarity has proved illusive in large measure because of serious confusion between the standards which govern the work of the United Nations High Commissioner for Refugees—as an international agency—and those which circumscribe the sovereign authority of states parties to the Refugee Convention. Because of the agency's silence on the Convention-derived authority of states to require the repatriation of persons who have ceased to be refugees, governments have too often taken UNHCR voluntary repatriation initiatives as a signal that they may commence their own less-than-voluntary repatriations without due regard for the cessation criteria, which in fact bind them. In the face of such disingenuous state action, UNHCR has not dependably insisted upon respect for the more stringent cessation criteria which govern access to mandated repatriation.

More fundamentally, though, UNHCR currently seems determined to pursue policies which put it at the center of decisionmaking on the termination by states of their refugee protection efforts for particular groups, even at the cost of developing a solid understanding of Convention-based rights and obligations. There are now policies which suggest that states have a duty to follow UNHCR's lead on the timing of repatriation—which policies regrettably do not clearly indicate that UNHCR voluntary repatriation programs may well be legally pursued long before states would be entitled to invoke the Convention's cessation criteria to justify mandated repatriation. Indeed, UNHCR has gone farther still, actively promoting its own role in determining when and if the cessation of refugee status is justified. This approach fails to take into account the differences between cessation under UNHCR's mandate and under the Refugee Convention itself, and also unhelpfully reinforces the impression that state parties need only follow the UNHCR's lead in determining when the withdrawal of protection is warranted, rather than conscientiously applying their minds to the circumstances of refugees measured in relation to their Convention duties.

As a result, the real obligations of states relevant to repatriation have been sidelined. Not only is there the potential for protection risks of the kind described above, but also for the loss of a more flexible understanding of refugee status that is reconcilable to the legitimate concerns of states required to host large numbers of refugees in flight from conflict and other forms of broadly-based harm. For these reasons, it is high time for formal recognition of the fact that the Refugee Convention grants governments the right to bring refugee status to an end and to commence mandated repatriation if and when there is a fundamental change of circumstances in the home country. Suggestions that governments should instead be concerned about whether repatriation is voluntary, or whether it can be achieved "in safety and with dignity" should be abandoned as legally misplaced.

The authentic test for access to mandated repatriation is whether the change in the country of origin is truly fundamental, in the sense that the cause of flight or presence abroad has been eradicated, the change has been shown to be enduring, and it has been shown to have practical consequences, in the sense that the former refugee will be restored to the protection of the country of origin. When these criteria are met, the next issue is whether repatriation can be effected in compliance with other obligations under international human rights law, in particular with the former refugee's rights to security of person, to be free from cruel, inhuman, or degrading treatment, and not to be subjected to arbitrary or unlawful interference with his or her family life. So conceived, the refugee protection regime strikes an appropriate balance between acknowledging the critical moral imperative to shelter those who cannot safely remain in states where they face the risk of being persecuted, and recognizing that this moral right will yield practical protection results only if firmly anchored in an honest affirmation of states' self-imposed limitations on their migration control authority.